TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 122.

DANIEL H. CARSTAIRS AND JOHN H. CARSTAIRS, CO-PARTNERS, TRADING AS CARSTAIRS BROTHERS, PLAINTIFFS IN ERROR,

vs.

WILLIE B. COCHRAN, TREASURER AND COLLECTOR OF BALTIMORE COUNTY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED AUGUST 26, 1902.

(18,654.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 8, 1903.

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Petition for Writ of Error.

Filed August 14th, A. D. 1902.

In the Court of Appeals of Maryland.

DANIAL H. CARSTAIRS and JOHN H. CARSTAIRS, Trading as Carstairs Brothers, Appellants, *vs.* WILLIE B. COCHRAN, Treasurer and Collector of Baltimore County, Appellee.	Petition for Writ — Error.

Appeal from the circuit court of Baltimore county.

Come now the appellants, Danial H. Carstairs and John H. Carstairs, trading as Carstairs Brothers, and say that on the 19th day of June, 1902, judgment in this case was entered by this
2 court in favor of the appellee, and against the appellants by which said judgment the appellants were aggrieved in that in said judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of these appellants, all of which will appear more in detail from assignment of errors filed with this petition. Wherefore these appellants pray that a writ of error may be issued to the Supreme Court of the United States for a correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the Supreme Court of the United States.

W. CABELL BRUCE,
D. K. ESTE FISHER,
3 *Composing Firm of Fisher, Bruce and Fisher, Attorneys for Danial H. Carstairs and John H. Carstairs, Trading as Carstairs Brothers.*

STATE OF MARYLAND:

Desiring to give the petitioners an opportunity to test in the Supreme Court of the United States the question presented in the aforegoing petition and in the assignment of errors filed therewith, it is hereby ordered that a writ of error be allowed to said court, and that the same be made a supersedeas upon the filing by the petitioners of a bond in the penal sum of $3500.00, in the form and with a surety to be approved by me.

In testimony whereof witness my hand this 13th day of August, 1902.

JAMES McSHERRY,
Chief Judge of the Court of Appeals of Maryland.

4 On the back thereof, is the following endorsement to wit: Mr. Clerk: Please file this petition for writ of error and the assignment of errors therewith Fisher Bruce & Fisher, attorneys for petitioners.

5 *Assignment of Errors.*

Filed August 14th, 1902.

UNITED STATES OF AMERICA:

Supreme Court.

DANIAL H. CARSTAIRS and JOHN H. CARSTAIRS, Trading as Carstairs Brothers, Plaintiffs in Error,
vs.
WILLIE B. COCHRAN, Treasurer and Collector of Baltimore County, Defendant in Error.
} Assignment of Errors.

In the case, in the court of appeals of Maryland, begun and holden at Annapolis in the State of Maryland on the first Monday of April, 1902, wherein the said Danial H. Carstairs &c. were appellants, and Willie B. Cochran &c. was appellee, and wherein final judg-
6 ment was entered in favor of the said appellee against the said appellants (and said court being the highest court of law and equity of said State in which a decision could be had in the said case) upon the writ of error allowed upon the said judgment, returnable to the October term of the Supreme Court of the United States, to be begun and *and* holden in the city of Washington, in the District of Columbia, on the second Monday of October, 1902, the said Danial H. Carstairs &c., the plaintiffs in error, make the following assignment of errors committed by said court of appeals of Maryland, as appeared by the record in the said case, that is to say:—

1. That by a statute of the *statute of the* State of Maryland, to wit:—the act of the General Assembly of Maryland of 1892,
7 chapter 704, each distiller and owner or proprietor of a bonded or other warehouse, in which distilled spirits are stored, is required to make report to the State tax commissioner on the first day of January of each year, of all distilled spirits on hand at such date, and a tax for the ensuing year is levied on the amount of distilled spirits so in hand, and required to be paid by said distiller or owner or proprietor of a bonded or other warehouse, in which distilled spirits are stored, notwithstanding the fact that said distilled spirits are not the property of nor owned by said distiller or owner or proprietor of a bonded or other warehouse, but the property of other persons, unknown to said distiller or owner or proprietor, the

ownership of the same being evidenced by negotiable warehouse receipts or certificates.

8 That said act of the General Assemby of Maryland requiring said distiller or owner or proprietor to pay the tax upon distilled spirits which belong to other persons is the taking of said distiller's or owner's or proprietor's property to pay the debt of another, and is therefore contrary and repugnant to section one of the fourteenth amendment of the Constitution of the United States, which guarantees that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States," and that no State shall deprive any person of life, liberty or property without due process of law," and by the determination and judgment of said court of appeals of Maryland, to review — said writ of error has been sued out, allowed and is prosecuted, it is *prosecuted, it is* determined and adjudged that the said

9 of the State of Maryland, to wit: the said act of 1892, chapter 704, is a valid exercise of the rightsful authority of the State of Maryland, and that said statute of said State is not contrary to the provisions of the Constitution of the United States of America, and that the plaintiffs in error who are distillers, owning bonded warehouses in said State are liable to the defendant in error for the tax aforesaid sued for in this action upon spirits in said bonded warehouses on the 1st day of January, 1900, belonging to persons other than the plaintiffs in error, and holding negotiable warehouses certificates therefor evidencing their ownership, and unknown to the plaintiffs in error.

And the plaintiffs in error say that the rulings, determination and judgment of the said court of appeals of Maryland, contained in and shown by the said record in sustaining the validity of the said

10 statute of the said State, to wit: the act of 1892, chapter 704, and the said tax, are repugnant to the said provisions of section one of the fourteenth amendment of the Constitution of the United States.

And the plaintiffs in error further assign as error.

2. That the said court affirmed the ruling of the circuit court for Baltimore county (the trial court) in over-ruling the demurrer of the plaintiffs in error to the amended declaration.

3. And that the court of appeals erred in affirming the action of the said court in refusing to permit the plaintiffs in error to put to the plaintiff in error, John H. Carstairs, as a witness upon the stand, the question embodied in the first bill of exceptions of the

11 plaintiffs in error "Did you own any of these spirits that were so returned?"

4. And that the said court of appeals erred in affirming the action of the said circuit court in refusing to permit the plaintiffs in error to offer the evidence set forth in the following offer embodied in the second bill of exceptions of the plaintiffs in error, to wit:

"The defendants offer to prove by the witness, John H. Carstairs "and by Mr. Donaldson that the defendants on the first day of Janu- "ary, 1900, did not own any of the whiskey mentioned in the tax

"bill offered in evidence, and in the return made by the defendants "to the State tax commissioner in January, 1900, excepting 489 "barrels, and that the defendants have not owned any of said spirits "since that time excepting those 489 barrels, but that all of said "whiskey, excepting said 489 barrels belonged to other per-
12 "sons unknown to the defendants, who held negotiable ware-
"house certificates therefor, evidencing their ownership."

5. And that the said court of appeals erred in affirming the action of the said circuit court in granting the two prayers of the defendant in error embodied in the fifth bill of exceptions of the plaintiffs in error, as follows:

1st prayer. If the jury find that the State tax commissioner on or about the 28th day of February, 1901, made return to the county commissioners of Baltimore county of the number of barrels of spirits and the valuation set thereon by said tax commissioner held by the defendants, or in their custody on the first day of January 1900, as appears by the return offered in evidence and that the county commissioners of Baltimore county in making their levy for State and county taxes for the year 1900 includ*ing* in their
13 said levy the sum of four thousand, five hundred dollars for taxes due by all the distillers in Baltimore county, including the taxes estimated to be due by the defendants for that year; and if the jury shall find that defendants have not paid the taxes on said spirits so returned by the tax commissioners, or any part thereof, then the verdict of the jury in this case should be for the amount of taxes claimed by the plaintiff with interest thereon from June 14th, 1901."

"2nd prayer. If the jury shall find that the defendants in the month of January, 1900, made return to the State tax commissioner, under the act of 1892, chapter 704, of the amount of spirits in their bonded warehouse on the first of January, 1900, and that the State tax commissioner valued said spirits at eight dollars per barrel, and that on the 19th day of April, 1900, the State tax commis-
14 sioner wrote to the county commissioners of Baltimore county, saying that he would transmit the returns of spirits held in the warehouses in Baltimore county the following week, and that the same was not sent until on or about 28th February, 1901, and if they further find that the county commissioners in making their levy for State and county taxes for the year 1900, made the same upon an estimate of four thousand five hundred dollars due for spirits by the distilleries situated in Baltimore county, and included therein the taxes estimated as proper to be levied for taxes by defendants for spirits for the year 1900 under the act of 1892, chapter 704, aforesaid, and if they find that said defendant has not paid taxes on said spirits for the year 1900, then the verdict in this case should be for the plaintiff for the amount of the tax
15 claimed with interest thereon from June 14th, 1901."

6. And that the said court of appeals erred in the action of the said circuit court in refusing the 2nd, 3rd and 8th prayers of

the plaintiffs in error embodied in the fifth bill of exceptions of the plaintiffs in error, as follows:

"2nd prayer. The court instructs the jury that *that* there is no evidence in this case that the defendants were owners on January 1st, 1900, or subsequently thereto, of any of the whiskey mentioned in the tax bill and return of the tax commissioner offered in evidence, and that it would be contrary to the law of the land, and a taking of property of the defendants without due process of law, to require them to pay taxes upon whiskey in the defendant's bonded warehouses on January 1st, 1900, or thereafter belonging to per-
16 sons other than the defendants and their verdict must therefore be for defendants."

"3rd prayer. The court instructs the jury that there is no evidence in this case that the State tax commissioner was authorized by law to value the spirits mentioned in the evidence to the defendants, or that the county commissioners were authorized by law to levy the tax claimed by the plaintiff upon said spirits, and their verdict must therefore be for the defendants.

"8th prayer. The court instructs the jury that the plaintiff is not entitled to recover in this action because.

1. There is no evidence that the defendants were on the first day of January, 1900, or thereafter, the owners of any of the spirits mentioned in the evidence.

17 2. Because there is no evidence of any obligation on the defendants to pay the taxes claimed in this action.

3. Because there is no evidence in this action that the State tax commissioner had lawful authority to value the spirits mentioned to the defendants, or that the defendants were lawfully assessed therewith; and that the verdict of the jury must be for the defendants."

There is error also in this, to wit: That by the said record aforesaid it appears that the judgment aforesaid, in the form aforesaid given, was given for Willie B. Cochran &c., against the said Danial H. Carstairs &c., whereas by the law of the land the said judgment ought to have been given for the said Danial H. Carstairs &c., against the said Willie B. Cochran &c., and the said Danial H. Car-
18 stairs &c., prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings, and the matters therein set forth, may be reversed, annulled, and held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment.

W. CABELL BRUCE,
D. K. ESTE FISHER,
Composing Firm of Fisher, Bruce and Fisher,
Attorneys for Plaintiffs in Error.

Endorsed on the back as follows: United States of America Supreme Court. Danial H. Carstairs, *et al.*, &c., plaintiffs in error.

vs. Willie B. Cochran, treasurer, &c., defendant in error
19 Assignment of errors:—Mr. Clerk:—Please file this assignment of errors. W. Cabell Bruce D. K. Este Fisher attorneys for plaintiffs in error. Filed August 14, 1902.

20 *Writ of Error. Filed August 14th*, 1902.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of Maryland, Greeting:

[The Seal of the Circuit Court, Maryland.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of Maryland before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Willie B. Cochran, treasurer of Baltimore county and Danial H. Carstairs and John H. Carstairs,
21 copartners trading as Carstairs Brothers. Wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repu-nant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Danial H. Carstairs and John H. Carstairs, as by
22 their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of

23 the United States, the 13th day of August, in the year of our Lord one thousand nine hundred and two.

JAS. W. CHEW,
Clerk of the Circuit Court of the United States for the District of Maryland.

Allowed by

JAMES McSHERRY,
Chief Judge of the Court of Appeals of Maryland.

24 *Citation.*

Filed August 14th, 1902.

UNITED STATES OF AMERICA, *ss:*

To Willie B. Cochran, treasurer and collector of Baltimore county, Greeting:

Your are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of Maryland, wherein Danial H. Carstairs and John H. Carstairs, copartners trading as Carstairs Brothers are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error as in the said writ of
25 error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James McSherry chief justice of the court of appeals of Maryland this thirteenth day of August, in the year of our Lord one thousand nine hundred and two.

JAMES McSHERRY,
Chief Judge of the Court of Appeals of Maryland.

Endorsed on the back as follows:

Service of the within citation and delivery of a copy thereof to me this thirteenth day of August, 1902, is hereby admitted. D. G. McIntosh, attorney for Willie B. Cochran, treasurer and collector. Filed August 14th, 1902.

26 *Record.*

In the Court of Appeals of Maryland.

DANIEL H. CARSTAIRS and JOHN H. Carstairs, Trading as Carstairs Brothers,
vs.
WILLIE B. COCHRAN, Treasurer and Collector of Baltimore County.

No. —. Appeal from the Circuit Court of Baltimore County.

Fisher, Bruce and Fisher, for appellants.
David G. McIntosh, for appellee.

Filed April 4th, 1902.

27 In the Circuit Court for Baltimore County, Law Side.

ALFRED FOWBLE, Treasurer and Collector of Baltimore County,
vs.
DANIEL H. CARSTAIRS and JOHN H. CARSTAIRS, Trading as Carstairs Brothers.

Docket Entries.

July 11th, 1901.—Order, nar. notice & tax bill for Co. taxes for year 1900 filed. S'p'na issued and copy of nar. notice and tax bill sent with writ. App. of D. G. McIntosh for pl't'ff.

July 15th, 1901.—App. of Messrs. Fisher Bruce and Fisher for def'ts.

Rule plea.

July 26th, 1901.—Pleas to each of the first two counts of the pl't'ff's declaration filed. Service of copy admitted. Rule rep. as to said counts.

Same day.—Demurrer to each of the 3rd and 4th counts of declaration filed. Service of copy admitted.

Nov. 30th, 1901.—Motion to withdraw pleas filed to 1st and 2nd counts of the declaration, leave granted,

Same day.—Demurrer to 1st and 2nd counts of the declaration filed.

Same day.—Issue joined on demurrer.

Dec. 13th, 1901.—Demurrer overruled as to 1st and 2nd counts in the declaration and sustained as to the 3rd and 4th counts in the declaration and leave granted to amend declaration.

28 December 30th, 1901.—Amended declaration filed.

Rule plea to amended declaration.

Jan'y 3rd, 1902.—Plea to each of the 1st and 2nd counts of the amended declaration filed.

Same day.—Demurrer to each of the 3rd 4th and 5th counts of the amended declaration filed.

Feb'y 5th, 1902.—Demurrer overruled.

Same day.—Plea filed: rule rep.

Same day.—Issue joined.

Feb'y 5, 1902.—Jury sworn. Viz.

Same day.—Agreement as to facts filed Feb'y 5 1902. Motion to make Willie B. Cochran treasurer and collector, plaintiff in place of Alfred Fowble filed. Leave granted Motion objected to by def'ts. Objection overruled, amendment made, exceptions noted.

Same day.—Plaintiff's 1st and 2nd prayers, granted and filed.

Same day.—Defendants' 1st, 2nd, 3rd, 4th, 5th, 6th, 7th & 8th prayers refused and filed.

Same day.—Defendants except to the granting of the plaintiff's prayers and to the refusal of the def'ts' prayers.

Same day.—Verdict in favor of the plaintiff.

Damages assessed by the jury at one thousand five hundred and seventeen dollars and sixty-nine cents ($1517.69) Feb'y 10th 1902. Judgement on verdict in favor of the plaintiff for the sum of fifteen hundred and seventeen and $\frac{69}{100}$ dollars. ($1517.69) damages assessed by the jury with interest from date and costs.

March 3rd, 1902.—Defendants' 1st, 2nd, 3rd, 4th and 5th bills of exceptions filed.

March 25th.—Order for an appeal to the court of appeals of Md. filed.

March 27th, 1902.—Appellants approved appeal bond in the penalty of three thousand two hundred dollars, filed.

This action was commenced in the circuit court for Baltimore county on the law side thereof, on the 11th day of July in the year 1901, by the plaintiff, through his counsel. D. G. McIntosh, filing an order to docket a suit under the aforegoing titling; and thereafter on the 30th day of December 1901, filing the following amended declaration, to wit:

29 STATE OF MARYLAND, *Baltimore County*, } *To wit:*

Alfred Fowble, treasurer and collector of Baltimore county by D. G. McIntosh his attorney, sues Daniel H. Carstairs and John H. Carstairs, trading as Carstairs Brothers:

1. For money payable by the defendants to the *the* plaintiff as treasurer and collector of State and county taxes for Baltimore county: For money received by the defendants for the use of the plaintiff.

2. And for money due from the defendants to the plaintiff as aforesaid for State and county taxes for the year 1900.

3. And for money due from the defendants as distillers in Baltimore county to the plaintiff as aforesaid for State and county taxes for the year 1900 upon an assessment of $127060 made by the State tax commissioner against the defendants for distilled spirits

had on hand by them on the first day of January 1900, and which said assessment agreeably to the provisions contained in chapter 704 of the acts passed at the January session 1892 of the General Assembly of Maryland, was liable to State and county taxes, and which said valuation of the State tax commissioner was returned by him to the board of county commissioners of Baltimore county and was placed in the levy made by said board of commissioners for the year 1900, and there is now due to the plaintiff for county taxes on said valuation and assessment so made as aforesaid the sum of $1143.54 for county taxes and the sum of $225.54, for State taxes with interest on said sums, from the time they became due and payable, and the payment of which said sums the plaintiff hath demanded, and the defendant hath refused to pay.

4. And for that the defendants are distillers and the owners or proprietors of certain premises in Baltimore county on which distilled spirits are stored and of which the said defendants on the first day of January in the year 1900 were the custodians, and it became the duty of said defendants on said first day of January in the year 1900 to make report to the State tax commissioner of all distilled spirits in the custody of said defendants on that date. And the said defendants are in law liable to pay the State and county taxes on the valuation of the distilled spirits so in hand, at such date, and it further became the duty of said defendants to make return on the said first day of January, to the State tax commissioner of all the distilled spirits in their custody on that date, and the said defendants accordingly made report to the tax commissioner of the State of Maryland of 1587$\frac{7}{2}$ barrels of distilled spirits in their custody on said first day of January, which the said tax commissioner valued, for the purpose of taxing at eight dollars per barrel amounting in the aggregate to the sum of $127060 and the said tax commissioner transmitted to the county commissioners of Baltimore county a copy of said valuation so made by him, and the said county commissioners in making their levy for State and county taxes for the year 1900, included the valuation of the spirits of defendants, in the levy made by them, and the said defendants became liable to pay the sum of $1143.54 for county taxes and the sum of $225.54 for State taxes, and the plaintiff hath demanded of the said defendant the said sums of money with interest from the time the same was due and payable which the defendants refuse to pay.

5. And for that the defendants on the first day of January in the year 1900, and theretofore were distillers and the owners or proprietors of certain premises in Baltimore county in which distilled spirits were stored at the date aforesaid, and of which the defendants on said day were the custodians, and it became the duty of said defendants on the first day of January in each and every year to make report to the State tax commissioner of all distilled spirits in their custody at such date; and the said defendants accordingly reported to the State tax commissioner that there *was* in their custody, on said first day of January 1900 1587$\frac{7}{2}$ barrels of distilled spirits which the said tax commissioner valued for purposes of taxation at eight

dollars per barrel amounting in the aggregate to the sum of $127060, a copy of which valuation was by said tax commissioner duly transmitted to the county commissioner of Baltimore county, where the said premises on which said spirits were stored is situate, and the said spirits upon the said valuation and return so made became subject to State and county taxation; and a levy was made upon said distilled spirits by the said county commissioners for the year 1900 at the rate of ninety cents per one hundred dollars for county purposes amounting to $1143.54, and at the rate of seventeen and three quarter cents, per one hundred dollars, for State purposes amounting to $225.51 which said respective sums, with interest thereon from the first of May 1900, on the county tax, and interest from January 1st, 1901, on the State tax are due and payable and the plaintiff hath demanded payment, but the defendants refuse to pay the same.

And therefore the plaintiff brings suit and claims twenty-five hundred dollars damages.

D. G. McINTOSH,
Att'y for Plaintiff.

Pleas to First Two Counts of Amended Declaration.

(Filed Jan'y 3rd, 1902.)

Daniel H. Carstairs and John H. Carstairs, the defendants in this action, by Fisher, Bruce and Fisher, their attorneys, for a first plea to each of the first two counts of the amended declaration, of
31 the plaintiff, say that they never were indebted as alleged, and for a second plea to each of said counts the said defendants say that they never promised as alleged.

FISHER, BRUCE AND FISHER,
Att'ys for Def'ts.

Demurrer to the 3rd, 4th, and 5th Counts of the Amended Declaration.

(Filed Jan'y 3rd, 1902.)

Daniel H. Carstairs and John H. Carstairs the defendants in this action by Fisher, Bruce and Fisher their attorneys demur to each of the third, fourth, and fifth counts in the amended declaration of the plaintiff, and say that each of them are bad in substance.

FISHER, BRUCE AND FISHER,
Att'ys for Defendants.

Pleas to the Third, Fourth, and Fifth Counts of Amended Declaration.

(Filed Feb'y 5th, 1902.)

The defendants in this action by Fisher Bruce and Fisher their attorneys for a first plea to each of the third, fourth and fifth counts

in the amended declaration of the plaintiffs say that they never were indebted as alleged, and for a second plea to each of said counts that they never promised as alleged.

FISHER, BRUCE AND FISHER,
Att'ys for Defendants.

Agreement as to Facts.

See Defendants' 4th Bill of Exceptions.

(Filed Feb'y 5th, 1902.)

Plaintiff's and Defendants' Prayers.

See Def'ts' 5th Bill of Exceptions.

(Filed Feb'y 5th, 1902.)

32 *Defendants' 1st, 2nd, 3rd, 4th, and Fifth Bills of Exceptions.*

(Filed March 3rd, 1902.)

The Defendants' First Bill of Exceptions.

At the trial of this action, the plaintiff, in order to maintain the issue joined on his part, offered in evidence the tax bill against the defendants upon distilled spirits for the year 1900, as follows:

(Here follows tax bill marked p. 32.)

33 and offered the testimony of James E. Green tending to prove that he was the chief clerk and auditor in the office of the county commissioners of Baltimore county: That Alfred Fowble was treasurer and collector of said county during the years of 1900 and 1901, and the witness then produced the Journal of Proceeding- of the County Commissioners for Baltimore County, and testified that it contained the levy for 1900, made and signed by a majority of the county commissioners; and on being asked whether it included the levy on the spirits of the defendants, testified that it included a levy on the basis of $500,000., which was estimated as the amount of what the distilled spirits were likely to be, based upon the amount of the previous year, no return having been received from the State tax commissioner. That while the levy was in course of being determined on by the commissioners, a letter was received at their office from the State tax commissioner, dated April 19, 1900, addressed to Mr. E. S. Bosley, clerk, stating that the amount of distilled spirits tax of Baltimore county would be sent the next week:

Copy of letter here referred to.

OFFICE HOURS: { From April 1st to November 1st, from 9 A. M. to 5 P. M.
From November 1st to April 1st, from 9 A. M. to 3 P. M.

THOMAS J. MEADS,
THOMAS R. JENIFER,
FRANK P. BOSSOM, } CLERKS.

TAX LEVY, 1900.
12 District

ALFRED FOWBLE,
Treasurer and Collector of State and County Taxes
POSTOFFICE--TOWSON.

BRING THIS BILL WITH YOU.

DEMOCRAT PRINT, TOWSONTOWN.

LEDGER FOLIO.....

Mr. Carstairs Brothers

To County Commissioners of Baltimore County, Dr.

For County Tax, at 90 Cents per $100, on Assessment of $1270 60	1143 54	
Interest from May 1st, 1900, (see new Discount and Interest Law on back of bill)	85 77	1229 31

To The State of Maryland, Dr.

For State Tax, at 17½ Cents per $100, on Assessment of $1270.60.	225 54	
Interest from Jan'y 1st, 1901 (See State Discount and Interest Rate on back of bill)	7 90	233 44
Constable's Costs,		25
Levy,		
Survey,		
Advertising,		
Report of Sale,		
Order Nisi,		
Clerk's Costs,		
Deed,		
Commissions,		
Received Payment,		
.....Treasurer and Collector.		1462 75
.....1901. *Pr.....Clerk.*		7 Month, 1901.

Saturdays only, at the Manufacturers' National Bank, N. E. Cor. Balto. and Liberty Sts., Balto., from 9 A. M. to 1 P. M.

D. H. Carstairs et al
vs.
H. A. Cochran etc. } No 122 f. 32

LEVY 1900.

12 *DISTRICT.*

Ledger Folio 270.

CARSTAIRS BROTHERS.

County Assessment, $1270.60			
County Tax,	$ 1143	54	
Interest,	85	77	1229 31
State Assessm't,	$ 1270	60	
State Tax,	$ 225	54	
Interest,	7	90	233 44
Constable's Costs.			25
Levy,			
Survey,			
Advertising,			
Report of Sale,			
Order Nisi,			
Clerk's Costs,			
Deed,			
Commissions.			
Total,			1462 75

.....*Clerk.*

.....Month, ...day, 1901.

State of Maryland, Treasury department, office of State tax commissioner.

ANNAPOLIS, *April* 19, 1900.

E. S. Bosley, Esq., clerk, Towson, Md.

DEAR SIR: Account of distilled spirits tax of Baltimore county will be sent next week.

Respectfully,

ROBERT P. GRAHAM,
State Tax Commissioner.

but that no return was received from the State tax commissioner of the amount of spirits returned by the defendants, until March 1st, 1901, when he returned that they were valued at $127,060.

The plaintiff then offered in evidence the return made to the county commissioners of Baltimore county, which is in the form set forth in the agreement of facts hereinafter mentioned as filed in evidence.

The plaintiff then proved that the tax bill for the year 1900 was then made out on said valuation, and the witness then stated
34 that tax bills bore interest under the local law of Baltimore county from the 1st of May of the year on which the levy was made, and that the defendant's distillery was at Highlandtown in Baltimore county.

On cross examination the witness then testified that up to March 1st, 1901, the commissioners did not know the amount of spirits chargeable to each distillery; and that the tax bill sued on was not made out until after said date, and that he could not say whether or not demand was made on the defendants before that date, but that until then, the commissioners lacked the information on which to make out the bill.

The witness then testified as follows:—

Q. What did you say that book is you have before you?

A. This is the Journal of Proceedings of the County Commissioners.

Q. The Journal of Proceedings of the County Commissioners?

A. Yes sir.

Q. What was that you read there a few moments ago?

A. This is the formal declaration of the levy.

Q. How is the levy made?

A. It is made by the county commissioners, now——

Q. This is that levy?

A. That is the levy.

Q. Is that in the form of a resolution or what?

A. It begins in this way: "We the county commissioners of Baltimore county having met, as required by law, for the purpose of making the annual levy of State and county taxes for the ensuing year, and providing for all the expenses and disbursements of said county, including all outstanding obligations of said county, which have accrued in previous years, do now order and publish as follows:"

and further down with reference to county taxes they say: "We do further impose an assessment or tax of ninety cents on every one hundred dollars worth of assessable property in Baltimore county as a county tax being $594.360, upon real, fixed personal and mixed property, upon the stock of Maryland corporations and upon distilled spirits in bond, being on a total basis of $660.400.83, $43.363.70, upon bonds and other evidences of debt, issued by any State, (except the State of Maryland) or by any public or private corporation in any such State, or in any foreign county, and owned by residents
35 of Baltimore county, being at the rate of thirty cents on every one hundred dollars worth of such bonds or evidence of del on a basis of $14.454.568. and in addition thereto, the amount to be ascertained on September 1st, 1900, as the county's proportion of taxes upon interest of mortgages to be collected within the year commencing on that date, at the rate of three fourths of eight per centum per annum on said interest, the amount of said mortgage tax being now estimated to be $4500." That is part of the declaration of the levy.

Q. That is the declaration of the levy?

A. Yes sir.

Q. Now before that, when the levy—the property upon which the levy is to take effect, of course is listed?

A. Yes sir, we have on our ledger no statement of property of any distilled spirits, for distilled spirits we have to await returns from State tax commissioner, and not having received them at that time, we estimated them?

Q. As a point of fact the distilled spirits was not on your levy?

A. No sir, but we had data.

Q. It was a mere estimate?

A. Yes sir, in fact the State commissioner very seldom sends them in time to be incorporated in the levy.

Q. Well Mr. Green, no taxable party of course can be liable for taxes until his property has been put on the tax list?

A. I think that is a question of law sir.

Q. Is not the method of the county commissioners to put the property of the taxable parties of the county upon the tax list?

A. The property returned to them by their assessors is listed on their ledger, but the returns of the spirits, we get from the tax commissioner.

Q. You could not charge anybody in the county for taxes for real estate until the assessment is made and that real estate placed upon the tax books?

A. We never do, we never assess real estate until it is gone through the form of being returned to us either by the assessors or owners voluntarily, and charged upon the proper books.

36 Q. I suppose the reason is under the circumstances you have no right to do it?

Objected to.

WITNESS: I can tell you what the habit and practice is— the prac-

tice with real estate and fixed property such as furniture and those things comes under the head which you described as taxes not being demanded until property is listed and charged on our books: in the matter of spirits we are unable to do it.

Q. You are able to do it when you get the returns from the State tax commissioner?

A. The law of 1892 makes us wait until the taxes are returned before we can demand taxes from owners of spirits.

Q. The levy of 1900 had been entirely completed before the State tax commissioner returned assessment on spirits of the defendants.

A. Yes sir, it was made upon from all the knowledge we had at that time.

Q. Does not the law provide that the county commissioners in making their annual levies shall levy the tax on distilled spirits which have been returned by the State tax commissioner upon the valuations returned by the State tax commissioner.

A. We had made the effort to procure them from the State tax commissioner, from the letter which I read to you, he promised to send them to us and he failed to keep his promise.

Q. Then your custom is first to list the property on the tax list before the levy is made?

A. All the property, the value and nature of which we can ascertain, we do, yes.

Q. Well is each individual who pays taxes put upon the tax list for property on which he is taxed?

A. As far as we are able to find his name out, and the nature and amount of his property, we do, yes.

Q. So the amount is made out from the tax list?

A. As far as possible; on mortgages we also have to make an estimate of what the amount is to be.

Q. You are now speaking of what the rate of taxation should be?

37 A. We have to do that Mr. Fisher.

Q. I mean to say in order to arrive at what the rate of taxation for the year should be, you are obliged to make estimate?

A. That is so.

Q. But you do not undertake to tax everybody whose name does not appear, or property does not appear on the tax books?

A. We do not consider tax on it until we receive the names and amounts of individual owners of property—the law of 1892 prevents us from taxing them against the individual until we receive the returns.

Re-direct examination.

(By Col. McIntosh:)

Q. Did I understand you to say Mr. *Mr.* Green, as a matter of fact, these returns on spirits frequently did not come in until after you made your levy?

A. That is my belief sir.

Q. And you are compelled to make them upon the estimates?
A. We have to do that in the absence of the specific returns.
Q. Were the Carstairs Brothers familiar with these proceedings prior to 1900?
A. I can hardly say that. I only came in the office on January 1st, 1900.

The plaintiff then closed.

The defendants then proved by JOHN H. CARSTAIRS, one of the defendants that his firm had owned the distillery at Highlandtown, known as the Robert Stewart distillery, since Dec. 1897, but did not get title to it until January 1898; that previous to that it was owned by the Robert Stewart Distilling Company from 1894, and that Robert Stewart built it in 1885, and conducted it in his name until 1894, and that the defendants had operated it since January 1898, and that they made a return to the State tax commissioners of the spirits on hand on January 1, 1900.

The defendants' counsel then asked the witness the following questions:

Q. Did you own any of these spirits that were so returned?

To which question the plaintiff objected.

And the court sustained the objection, and refused to allow
38 the question to be put or answered: to which ruling of the court the defendants excepted, and prayed the court to sign and seal this their first bill of exceptions, which is done accordingly this fifth day of February, 1902.

N. CHARLES BURKE. [SEAL.]

Defendants' Second Bill of Exceptions.

After all the evidence set forth in the defendants' first bill of exceptions had been offered, which is hereby made a part hereof as fully as if it were incorporated herein, and after the ruling of the court set forth in said first bill of exceptions, the defendants made the following offer:

Mr. FISHER: If your honor pleases, to make our proposition clear I will submit the following offer:

The defendants offer to prove by the witness, John H. Carstairs and by Mr. Donaldson that the defendants on the first day of January, 1900, did not own any of the whiskey mentioned in the tax bill offered in evidence, and in the return made by the defendants to the State tax commissioner in January, 1900, excepting 489 barrels, and that the defendants have not owned any of said spirits since that time excepting those 489 barrels, but that all of said whiskey, excepting said 489 barrels belonged to other persons unknown to the defendants, who held negotiable warehouse certificates therefor, evidencing their ownership.

To which *after* the plaintiff objected and the court sustained the objection, and refused to permit the evidence offered to be given, and the defendants excepted to the said ruling of the court, and prayed the court to sign and seal this their second bill of exceptions, which is done accordingly this fifth day of February, 1902.

N. CHARLES BURKE. [SEAL.]

Defendants' Third Bill of Exceptions.

After all the evidence mentioned in the first bill of exceptions had been given, which is hereby made a part hereof as fully as though incorporated herein, and after the ruling of the court mentioned in said first bill of exceptions, and after the offer of evidence, made by the defendants set forth in the defendants' second bill of exceptions, which is hereby made a part hereof as fully as
39 though incorporated herein, and after ruling of the court therein mentioned the defendants then proved by Thomas Donaldson that he was the manager of the defendants' distillery and that the defendants made a report to the State tax commissioner in the year 1900 of the spirits on hand, and that he knew what whiskey was mentioned in the report, and that it was in the different bonded warehouses on January 1, 1900, and continued therein, except that some little had been delivered out since that date.

The witness was then asked to describe to the jury the control the internal revenue officials of the United States had, and exercised over the distillery and bonded warehouses, and the plaintiff objected to said question, and the court sustained the objection, to which ruling of the court the defendants excepted, and prayed the court to sign and seal this their third bill of exceptions, which is done accordingly this fifth day of February, 1902.

N. CHARLES BURKE. [SEAL.]

Defendants' Fourth Bill of Exceptions.

After all the evidence mentioned in the defendants' first and third bills of exceptions had been offered, and after the offer of evidence referred to in the defendants' second bill of exceptions had been made, and the ruling of the court thereon, which are hereby made part thereof as fully as though incorporated herein, the following agreement of facts was offered in evidence:—

It is agreed as facts to be submitted to the jury in this case along with other facts, to be proven at the trial that the defendants in January 1900, made a return to the State tax commissioner under the act of 1892, c. 704, of the amount of spirits in their bonded warehouses on January 1st, 1900, without specifying whether the same were owned by the defendants or other persons, or were merely in their custody as the owners or custodians of said warehouses: and that the State tax commissioner valued said spirits at $8.00 per bar-

rel, but that in consequence of the decision of the court of appeals of Maryland, in the case of The Monticello Distilling Company *vs.* Baltimore City, the State tax commissioner did not transmit a copy of said valuation, to the county commissioners of Baltimore county until February 28th, 1901, on which date he did transmit a copy of said valuation, and that a copy of the document so transmitted to the said commissioners by the State tax commissioners on said date is hereto attached, and also a copy of said return by the defendants to said State tax commissioner.

D. G. McINTOSH,
Plaintiff's Attorney.
FISHER, BRUCE & FISHER,
Defendants' Attorneys.

40 Certified duplicate.

S. R. WATERS, *Clerk.*

Form for the Assessment of Distilled Spirits.

State of Maryland, Treasury department, office of the State tax commissioner.

ANNAPOLIS, MD., *Jan'y 9th*, 1900.

To Carstairs Brothers, distillers, Highlandtown, Baltimore county

DEAR SIR-: The following extracts from chapter 704, of the acts passed at the January session, 1892, of the General Assembly of Maryland, are given in order to exhibit the proper manner of making your return.

SEC. 1. Be it enacted by the General Assembly of Maryland That there shall be levied and collected upon all distilled spirits in this State as personal property the same rate of taxation which is imposed by the laws of the State on other property for State and county purposes.

SEC. 2. And be it enacted, That for the purpose of such assessment and collection it shall be, and it is hereby made the duty of each distiller, and of every owner or proprietor of a bonded or other warehouse, in which distilled spirits are stored, and of every person or corporation having custody of such spirits, to make report to the State tax commissioner on the first day of January of each and every year, of all the distilled spirits on hand at such date and the tax for the ensuing year from the said first of January, shall be levied and paid on the amount of distilled spirits so in hand, as representing the taxable distilled spirits for such year, provided, however, that the same distilled spirits shall not be taxed twice for the same year.

SEC. 5. And be it enacted, That no distiller, owner or custodian of such distilled spirits, shall permit the same to go from his possession or control without the report and payment of tax hereinbefore provided for, and any person or persons or corporation violating the

provisions of this section, shall be proceeded against by the proper officers authorized to receive said taxes, by distraint for the entire amount of the taxes assessed for the current year, and thereupon all such taxes shall become and be immediately due and collectable by restraint, together with all costs attending the proceedings, and a further penalty of five hundred dollars, for each such violation.

SEC. 6. And be it enacted, That any person or corporation making any false report or return, as to, or of the matters herein
41 provided for shall be deemed guilty of a misdemeanor and subject to indictment therefor, and upon indictment and conviction shall be fined not less than one hundred dollars nor more than one thousand dollars for each offense.

SEC. 7. And be it enacted, That it shall be the duty of all distillers, warehousemen, and others to exhibit all necessary information, on oath if required, to the appeal tax court of Baltimore city, the several boards of county commissioners in their respective counties where distilleries are situate, and to any authorized officer proceeding to execute a distraint or to collect the tax imposed under this act; and a failure so to do upon demand made, shall be deemed a misdemeanor, and subject to indictment, and upon indictment and conviction shall subject the offender to a fine of not less than fifty dollars nor more than five hundred dollars.

SEC. 8. And be it enacted, any warehouseman, custodian or agent, paying the tax on distilled spirits herein provided for shall have a lien upon the distilled spirits covered by such tax.

You are accordingly hereby requested to answer the subjoined interrogatories on the annexed blank for that purpose, having done so, to sign the same, and take the subjoined oath before a justice of the peace, or notary public, and return the same promptly to this office, as required by law.

Very respectfully, &c.,

ROBERT P. GRAHAM,
State Tax Commissioner.

Questions and Answers.

Q. 1. What is the name of the distillery which you are operating either as owner, proprietor, lessee, agent or otherwise, and in what capacity are you operating said distillery?

A. 1. Robert Stewart distillery; operating as owners.

Q. 2. Where is said distillery located, and what is your post office address?

A. 2. Highlandtown Md.; Highlandtown Md.

Q. 3. If said distillery is conducted by a corporation, please state its corporate name, and the title of the office you hold in said corporation?

A. 3. Not a corporation.

Q. 4. State what number of barrels, half barrels, quarter barrels,

casks and packages of distilled spirits, and of what kind, you
42 had on hand, or in your custody, or stored in any bonded or other warehouse, on the first day of January in the year 190- —and where stored, and when distilled. When casks and packages are named give the number of gallons therein.

A. 4. 14.545 bbls.; 2.665 half bbls.

J. H. CARSTAIRS,
Of the Firm of Carstairs Brothers.

Affidavit.

STATE OF PENNSYLVANIA, *To wit:*

On this 11th day of January A. D. 1900, before me the subscriber a notary public for the State of Pennsylvania in & for the Commonwealth of Pennsylvania, personally appeared J. H. Carstairs, and made oath according to law that the within statements contained in his answers to the above interrogatories are true to the best of his knowledge and belief.

Sworn before

[NOTARIAL SEAL.] ARNOLD KATZ,
Notary Public.

On the back thereof was the following:

Copy.

Report of Carstairs Brothers, Owners of Robert Stewart Distill-ry, Highlandtown, Md., for the Year 1900.

Received January 12th, 1900.

Certified Duplicate.

State of Maryland, Treasury department, office of the State tax commissioner.

ANNAPOLIS, MD., *Feb. 28th*, 1901.

To hon. county commissioners of Baltimore county.

GENTLEMEN: I hereby certify that, agreeably to the provisions contained in chapter 704, of the acts passed at the January session 1892, of the General Assembly of Maryland, Carstairs Brothers (owners of Robert Stewart distillery, make report to the State tax commissioner that said Carstairs Brothers had on hand on the 1st day of January 1900, 1587$\frac{1}{2}$ barrels of distilled spirits, which
43 I, as said tax commissioner, have valued for the purpose of taxation at $8, per barrel, amounting in the aggregate to $127,060.00.

You are directed and required by said act in making your annual levy to impose upon the spirits above mentioned and valued, the State taxes, as the same are prescribed by law, and such municipal or county taxes as all other personal property located within the bounds of any municipality or county in this State is subscribed to.

(Seal's place.) As witness my hand and the seal of my office this 28th day of Feb. 1901.

ROBERT P. GRAHAM,
State Tax Commissioner.

S. R. WATERS, *Clerk.*

The defendants then recalled John H. Carstairs to the stand and he testified that the first notice which the defendants had that the whiskey mentioned in said return was valued by the State tax commissioner was by the receipt by them on June 14th 1901, of the tax bill sued on, that after they made their return they heard nothing more of it until said date, and thought the matter was done with, because the law in Baltimore had been declared unconstitutional.

The defendants then closed.

The plaintiff then called James E. Green, who proved that when returns were made to the office of the said county commissioners by the State tax commissioner, it was not the habit or practice of the county commissioners to send out notice thereof to the persons to be affected by such returns.

The plaintiff then proved that the term of Alfred Fowble as county treasurer and collector had expired, and that Willis B. Cochran was the county treasurer and collector. Thereupon the court directed the declaration to be amended by striking out the name of Alfred Fowble, as treasurer and collector of Baltimore county, and inserting the name of Willis B. Cochran, to which direction and ruling of the court the defendants objected, but the court overruled their objection, and the defendants excepted, and the amendment was made, and the defendants prayed the court to sign and seal this their fourth bill of exceptions, which is done accordingly this fifth day of February, 1902.

N. CHARLES BURKE. [SEAL.]

44 *Defendants' Fifth Bill of Exceptions.*

After all the evidence mentioned in the defendants' first, third and fourth bills of exceptions had been offered, and after the offer, of evidence mentioned in the defendants' second bill of exceptions had been made, and after the rulings of the court on said several bills of exceptions mentioned, all of which are made part hereof as fully as though incorporated herein, and all evidence on both sides having been concluded, the plaintiff then offered the following prayers.

Plaintiff's 1st Prayer.

If the jury find that the State tax commissioner on or about the 28th day of February, 1901, made return to the county commissioners of Baltimore county of the number of barrels of spirits and the valuation set thereon by said tax commissioner held by the defendants, or in their custody on the first day of January 1900, as appears by the return offered in evidence and that the county commissioners of Baltimore county in making their levy for State and county taxes for the year 1900, included in their said levy the sum of four thousand five hundred dollars for taxes due by all the distilleries in Baltimore county, including the taxes estimated to be due by the defendants for that year; and if the jury shall find that defendants have not paid the taxes on said spirits so returned by the tax commissioners, or any part thereof, then the verdict of the jury in this case should be for the amount of taxes claimed by the plaintiff with interest thereon from June 14th, 1901.

(Granted)

Plaintiff's 2nd Prayer.

If the jury shall find that the defendants in the month of January, 1900, made return to the State tax commissioner, under the act of 1892, chapter 704, of the amount of spirits in their bonded warehouse on the first of January, 1900, and that the State tax commissioner valued said spirits at eight dollars per barrel, and that on the 19th day of April, 1900, the State tax commissioner wrote to the county commissioners of Baltimore county, saying that he would transmit the returns of spirits held in the warehouses in Baltimore county the following week, and that the same was not sent until on or about 28th February, 1901, and if they further find that the county commissioners in making their levy for State and county taxes for the year 1900, made the same upon an estimate of four thousand five hundred dollars due for spirits by the distilleries situated in Baltimore county, and included therein the taxes estimated as proper to be levied for taxes due by defendants for spirits
45 for the year 1900 under the act of 1892, chapter 704, aforesaid, and if they find that said defendant has not paid taxes on said spirits for the year 1900, then the verdict in this case should be for the plaintiff for the amount of the tax claimed with interest thereon from June 14th, 1901.

(Granted).

And the defendants offered the following prayers:

Defendants' First Prayer.

The defendants pray the court to instruct the jury that there can be no recovery in this action by the plaintiff because it appears by the evidence offered by the plaintiff that he is not at this time the treasurer and collector of Baltimore county.

(Refused)

Defendants' Second Prayer.

The court instructs the jury that there is no evidence in this case that the defendants were the owners on January 1st, 1900, or subsequently thereto, of any of the whiskey mentioned in the tax bill and return of the tax commissioner offered in evidence, and that it would be contrary to the law of the land, and a taking of property of the defendants without due process of law, to require them to pay taxes upon whiskey in the defendants' bonded warehouses on January 1st, 1900, or thereafter belonging to persons other than the defendants, and their verdict must therefore be for defendants.
(Refused).

Defendants' Third Prayer.

The court instructs the jury that there is no evidence in this case that the State tax commissioner was authorized by law to value the spirits mentioned in the evidence to the defendants, or that the county commissioners were authorized by law to levy the tax claimed by the plaintiff upon said spirits, and their verdict must therefore be for the defendants.
(Refused).

Defendants' Fourth Prayer.

The court instructs the jury that there is no evidence in this case that the spirits reported to the State tax commissioner in
46 the report made to him by the defendants in the month of January, 1900, were included in the annual levy made by the county commissioners of Baltimore county for taxes for the year 1900, and that their verdict must therefore be for the defendants.
(Refused).

Defendants' Fifth Prayer.

The court instructs the jury that there is no evidence in this action that there was any lawful levy of the taxes claimed in this action upon the spirits mentioned in the evidence, and their verdict must be for the defendants.
(Refused).

Defendants' Sixth Prayer.

The court instructs the jury that there is no evidence in this case that the defendants had notice that the spirits mentioned in the evidence had been valued to them by the State tax commissioner, or that they were assessed therewith until they were presented by the plaintiff with the bill for taxes sued for in this case, and their verdict must therefore be for the defendants.
(Refused).

Defendants' Seventh Prayer.

The court instructs the jury that there is no evidence in this case that the State tax commissioner transmitted to the county commissioners of Baltimore county, within the year 1900, any copy of any valuation made by him of the spirits mentioned in the report made to him by the defendants in the year 1900, as stated in the evidence, and their verdict must be therefore for the defendants.

(Refused).

Defendants' Eighth Prayer.

The court instructs the jury, that the plaintiff is not entitled to recover in this action because.

1. There is no evidence that the defendants were on the
47 first day of January, 1900, or thereafter, the owners of any of the spirits mentioned in the evidence.

2. Because there is no evidence of any obligation on the defendants to pay the taxes claimed in this action.

3. Because there is no evidence in this action that the State tax commissioner had lawful authority to value the spirits mentioned in the evidence to the defendants, or that the defendants were lawfully assessed therewith; and that the verdict of the jury must be for the defendants.

(Refused)

And the court granted both the plaintiff's prayers, and rejected all the prayers of the defendants; to which ruling of the court in granting the plaintiff's prayers and in rejecting those of the defendants, the defendants excepted; and prayed the court to sign and seal this their fifth bill of exceptions, which is done accordingly this fifth day of February, 1902.

N. CHARLES BURKE. [SEAL.]

I agree that the above bills of exception be signed.

D. G. McINTOSH,
Att'y for Pl'ff.

Whereupon, it is ordered by the court here, that a transcript of the record and proceedings in the plea aforesaid, with all things thereunto relating, be transmitted to the next court of appeals of Maryland; and the same is transmitted accordingly.

Test: N. BOSLEY MERRYMAN, *Clerk.*

STATE OF MARYLAND, *Baltimore County,* } *To wit:*

I, N. Bosley Merryman, clerk of the circuit court for Baltimore county, hereby certify that the aforegoing is a true transcript of the record and proceedings in the therein entitled cause, in accordance with the rules of the court of appeals relating thereto.

[SEAL.] In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court this 29th day of March, A. D. 1902.

N. BOSLEY MERRYMAN, *Clerk.*

Plaintiff's costs	$23.77
Defendants' "	6.95
Transcript	25.00

48 And afterwards to wit, on the 19th day of June 1902 the following judgment was made by the court of appeals, of Maryland, and entered of record to wit:—

This cause came on to be heard was taken up and argued by counsel and on consideration, whereof the court finds no error apparent in the record, of proceedings aforesaid, nor in giving the judgment aforesaid. It is therefore considered by the court of appeals of Maryland, on the 19th day of June, A. D. 1902, that the said judgment be and the same is hereby affirmed, and that the costs above and below be paid by the appel-ants and that execution issue accordingly.

And on the same day, to wit, June 19 A. D. 1902, there was filed in the office of the clerk of the said court of appeals a certain opinion in words and figures, following to wit:—

49 Court of Appeals of Maryland, April Term, 1902.

DANIEL H. CARSTAIRS and JOHN H. CARSTAIRS, Trading as Carstairs Brothers,
vs.
WILLIE B. COCHRAN, Treasurer and Collector of Baltimore County.

Judge PEARCE delivered the opinion of the court:

This appeal constitutes the third attack upon the validity of the act of 1892 ch. 704, as now amended by the act of 1900 ch. 320, being secs. 204 to 213 inclusive of the supplement to the Public General Code of Maryland, providing for the collection of taxes upon distilled spirits in this State.

The appellants admit that all the features of the law which are here assailed upon constitutional grounds, were considered by the court in Monticello Co. *vs.* Balt. City, 90th Md. 416, and that while the act was there held invalid, *as it then stood*, because of the failure to provide for a hearing in respect to the valuation to be placed on the spirits for the purposes of taxation, it was declared to be "in other respects free from constitutional objections." They contend however that the *sole ground of the decision in that case* was the failure to provide for notice of assessment (a defect which has since been cured by the act of 1900 ch. 320,) and that the expression of
50 opinion upon any other point was not involved in the decisive objection on which the judgment was reversed, and was there-

fore an "*obiter dictum*" which should not preclude them from asking, or the court from granting, a reconsideration of what was not then, but necessarily now is, the decisive point in controversy.

We cannot agree that the expression of opinion referred to was an *obiter dictum*. All the constitutional objections which are here urged, were urged in that case by the late Judge Fisher with all the ability and force for which he was so justly distinguished, and the ruling upon the prayers, which there constituted the single exception, required the consideration by the court of all those objections. It may be difficult to frame a concise definition of an "*obiter dictum*" applicable to every such expression of opinion, and some courts incline to the rule that the most deliberate expression of opinion, upon a question distinctly raised in the record, and fully argued by counsel, may nevertheless be regarded as a dictum, unless essential to the actual disposition made of the case. But as Bowie well says, "It is difficult to see why, in a philosophic point of view, the opinion of the court is not as persuasive *an* all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed on by the court, as if the decision had hung upon but one point;" and
51 in Maryland the rule is in accord with this view. In Alexander *vs.* Worthington, 5th. Md. 489, it is said, "All that is necessary in Maryland to render the decision of the court of appeals authoritative on any point decided, is to show that there was an application of the judicial mind to the precise question adjudged; and in Michael *vs.* Morey, 26th. Md. 261, it was said that a decision there cited, could not be said to be *obiter dictum*, "as the question was directly involved in the issues of law raised by the demurrer to the bill, and the mind of the court was directly drawn to, and distinctly expressed upon the subject." But as the question here is said to be one of much importance to the owners and custodians of this species of property, and is certainly important to the State, which derives all its needed revenues from taxation, and as it has been argued here with great earnestness and conspicuous ability, we shall state as briefly as possible the reasons which induce us to adhere to the views heretofore expressed. The provisions of the act of 1892, ch. 704, were sufficiently detailed in the opinion rendered in Monticello Co. *vs.* Baltimore City, *supra*, and that statement will be adopted for this case without repeating it here. That act is assailed here as it was there, as fundamentally vicious, and upon precisely the same grounds, with the exception of the want of notice of assessment, which has been cured by the act of 1900, ch. 320.

These grounds are two-fold; first, that it lays a tax upon prop-
52 erty, and not upon the *the* owner of the property, and second, that it compels one, not the owner of the spirits, to pay the tax due by the owner who is usually unknown to the party compelled to pay.

Upon the first of these grounds we said in the Monticello case: "Taxes of the kind here dealt with are, under article 15 of our declaration of rights, levied not on *things*, but on the *owners* of things,

and the value of the things owned fixes the measure of the owner's liability to contribute in taxes towards the support of the Government. This is an axiom of political economy, no less than a fundamental provision of our organic law. Appeal Tax Court, *vs.* Patterson, 50th. Md. 366; U. S. Elec. Power and Light Co., 79th. Md. 63. It cannot, therefore, be presumed that the legislature deliberately intended to disregard this principle, and to place the tax on the spirits, and not on the owners of them. 'Every person in the State,' says the 15th article of the declaration of rights, 'or persons holding property therein, ought to contribute his proportion of public taxes for the support of Government according to his actual worth in real and personal property.' It is the individual, then, who is *in* the State, or who holds property *therein*, that is liable to taxation. He may be out of the State; he may be a non-resident, but if he has property situate here, he is as much bound to contribute to the support of the Government according to the value of that property as though he were permanently domiciled within the limits of the Commonwealth. The purpose of the act, obviously,
53 was to raise a revenue from the owners of a class of property which up to the time of its adoption had not been reckoned in the assessment upon its owners; and the peculiar nature of the property itself, "the known difficulty in tracing its ownership, and "the ease and facility with which the title to it is transferable, were "all vital elements to be considered in devising a scheme for sub-"jecting the persons who owned, had possession of, or controlled "these distilled spirits, to the obligation of contributing their just "share of the public burden. Though the language employed, like "that used in many of the other assessment laws, if read literally "would indicate an intention to impose the tax on the property, and "not on the owner of it, that is not its meaning when considered in "connection with the settled policy of Maryland as announced in "the declaration of rights, and we hold therefore, that the tax is "upon the owner of the spirits, and not specifically upon the "spirits."

We have reproduced this passage from the opinion in the Monticello case, as a clear, adequate, and satisfactory exposition of the correspondence of the statute, in this regard, with the 15th. art. of the declaration of rights, upon which, after re-consideration of the subject, we feel we can safely repose. In support of this confidence we may appropriately refer to the language of Appeal Tax Court *vs.* Patterson, *supra*, in which the court, quoting from Cooley on Taxation, declares that protection of the Government is the consid-
54 eration for which taxes are paid; that this protection may be either to the rights of person, or to the rights in property, and that taxes may consequently be imposed when either person or property is within the jurisdiction, and that it is competent for any State to provide that tangible personal property situated within it may be taxed there. The court then proceeded to say: "The 15th. article "of our declaration of rights is apparently a modification of one of "the four maxims with regard to taxation in general, laid down by

"Adam Smith in the Nature and Causes of the Wealth of Nations: "That distinguished author's first maxim is, 'The subjects of every "State ought to contribute towards the support of Government "as nearly as possible in proportion to their respective abilities; "that is in proportion to the revenue which they respectively enjoy "under the protection of the State.'" * * * The analogy of thought and expression here is marked, and throws a clear light upon the meaning of our 15th. article. And so in Ward *vs.* Const, 10th. B. & C. 635, where a tax was payable by all persons "having or holding lands," the words were held to apply to all persons receiving the rents and profits, and so to embrace both lessor and lessee, according to the value of their respective estates or interests in the lands.

The argument of the appellants upon this point as stated in the language of their brief, is, that this act compels one person to contribute *not his proportion*, but *another person's proportion* of
55 public taxes for the support of Government, by requiring him to act as collector. But this statement confounds *contribution* and *payment* and wholly omits the consideration of *of* the lien given the distiller upon the property in his custody, which effectually protects him against the *contribution* of another's proportion of taxes, while it *secures* to him the repayment of that which he is required to collect and pay upon the faith of the lien created in his favor. The contribution to public taxes required of every property owner according to his actual worth in real and personal property, necessarily requires uniformity of taxation and though both the standard by which valuation is made, and the rate of tax imposed, be uniform in each class, yet the uniformity required by art. 15 as a vital element of "just proportion" cannot be attained unless *all* the tangible property in the State is so valued and assessed, and unless its owner wherever he may be does contribute his proportion according to the value of that property. So far then, from the 15th. article forbidding the tax here sought to be recovered, it imperatively requires that some adequate means be devised for enforcing its payment.

In reference to the objection that the act in question takes one man's property to pay the debts of another, we said in the Monticello case: "The requirement that the distiller shall pay the tax for "the owner is neither unreasonable nor unlawful, because it simply
"makes him the agent of the State to collect for the State,
56 "precisely as a corporation is made an agent to collect from "its stockholders the tax due by them on the stock which "they hold. The legislation of 1892 with respect to distilled spirits, "is, in this particular, identical with the provisions of the code re- "lating to the tax on shares of stock, and these latter have been "upheld by this court as valid enactments. Casualty Ins. Co.'s case "82 Md. 564; Amer. Coal Co. *vs.* County Comms. 59 Md. 197."

By sec. 138 of art. 81, the tax upon shares of stock in home corporations, held by non residents, is to be levied and collected from such corporation, and may be charged to the account of such stock-

holders, and shall be a lien on the stocks therein held by them respectively until paid; and sec. 141 makes a similar provision as to resident stockholders, except that no lien is given as to them. In 59th. Md., *supra*, the court said: "The statute having created the duty and obligation to pay, when the shares of stock are assessed to the individual owners, that duty and obligation on the part of the corporation may be enforced by a proper action at law, the plaintiff in such case showing the right claimed to be within the statute." In the Casualty Co.'s case, *supra*, the decision in 59th. Md. was confirmed and reference was made to Nat. Bank *vs.* Kentucky, 9th. Wall. 353, in which the court said: "In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation;" and Judge Cooley says on page 373 of his work on taxation: "Statutes sometimes provide
57 that tangible personal property shall be assessed wherever in the State it may be, *either to the owner himself* or *to the agent or other person having it in charge; and there is no doubt of the right to do this, whether the owner is resident in the State or not*," and numerous cases are cited in support of this statement of the law.

The case of Hartman *vs.* Greenhow, 102 U. S. 684, was much relied on by the appellant to show that the Supreme Court denies this doctrine, but it cannot be properly so regarded. In that case, Hartman was the owner of certain overdue coupons cut from bonds issued by the State of Virginia. The bonds to which said coupons were originally attached were held by a third party, and Hartman tendered to the treasurer of Richmond these coupons in payment of taxes due by him, they being receivable by law for that purpose. The law however forbid the treasurer to receive such coupons in discharge of taxes, without first deducting the taxes due on the bonds to which the coupons were originally attached, and he claimed the right to make such deduction from these coupons. It was determined that the coupons held by Hartman being negotiable when detached from the bonds, and passing by delivery, ceased to be incidents of the bonds, and were distinct contracts imposing separate obligations upon the State, and that the holder of the contract evidenced by the detached coupons, could not be required to pay the taxes levied upon the contract evidenced by the bonds, and
58 held by a stranger. But there is no analogy or similarity between that case, which deals with the rights of a holder of a negotiable instrument, and one in which the agent or custodian of another's tangible property is required to collect and pay the tax upon that specific property in his possession and control, in consideration of a lien thereon created for his protection. The appellants contend further however that there is a great and fundamental distinction to be observed between the relation of the distiller to his vendee, and that of the corporation to its stockholder, in that the distiller has no funds of his vendee in his hands out of which he can pay the tax, whereas, when the corporation pays the tax due from its stockholder, it pays it with money of the stockholder's, since every stockholder is an owner of an undivided interest in the property of

the company. But this contention will not bear analysis. In New Orleans *vs.* Houston, 119 U. S. 265, where a tax assessed upon the shares of stockholders was required to be paid by the corporation, which was entitled to charge the same to the account of the stockholder, and to collect it from him, the same theory was urged in objection as is here presented, but the court said: "This payment is to be made irrespective of any dividends or profits payable to the shareholder out of which it could be repaid." And this is obviously true in every such case, since the tax may be payable at any period not coincident with the possession by the corporation of any dividends or profits payable to the stockholder,
59 that is, between the payment of one dividend, and the declaring of another—or at a period when the usual dividends may not be earned, or have been passed, and when therefore there is no fund in the hands of the corporation belonging to the stockholder out of which the tax can be presently repaid; and in such case, even though the stockholder be the owner of an *undivided* interest in the property of the corporation, such an interest would not provide a fund pres-ntly due from the corporation to the stockholder, and applicable to the repayment of the tax; and it would therefore be necessary in the language of sec. 138 of art. 31 "to charge the same to the account of the stockholder," to be *thereafter* repaid to the corporation, either by deduction from the next dividend, however remote, or from the next distribution of undivided profits, or from the undivided interest of the stockholder in the general property of the corporation, upon liquidation, or to be recovered by suit as against any other debtor—where no lien is given for repayment.

The confidence of the appellants therefore, that no case can be found in which one person, out of his own money, has been required to pay a tax due from another, does not appear to be justified.

The principle and policy of this legislation is not new in this State and the resistance to it in this case is due, we apprehend, to its application to a species of property of large value which has
60 heretofore escaped taxation. Section 66 of art. 81 of the Code provides that "the tenant or person holding any leasehold estate, shall pay to the collector the taxes levied upon the demised premises, and shall have his action against the landlord for the sum so paid, or may deduct the same out of the rent reserved, unless otherwise agreed between the lessor and lessee." The alternative remedy given—of deduction from rent or recovery by action, is a distinct recognition of the fact that in such cases the taxes may sometimes be payable when there is no rent due and when therefore the remedy by deduction would not be available. This provision of law has been in force since 1812, when it was made the duty of the tenant holding any leasehold estate "to pay the collector the sum valued for the interest or estate of any landlord," the language having since taken the form now appearing in the Code, and it was before this court in P. W. & B. R. R. *vs.* Appeal Tax Court, 50th. Md. 411, where Judge Alvey said: "This provision was intended as a means of facilitating the collection of taxes, there being many cases where the

landlord might not be known or might be absent." The principle embodied in the act of 1892 having thus been upon the statute book, unquestioned, so far as we are advised, for nearly one hundred years; being supported by the unqualified authority of Judge Cooley in his work on taxation, and being impliedly recognized as a valid legal principle in 50th. Md., *supra*, we could not now hesitate to uphold it. Nor can we regard it as a hardship upon the distiller that he should be required to pay
61 this tax in consideration of the lien given for its repayment. As was said in the Monticello case, the purchaser of the warehouse certificate is chargeable with knowledge of what the statute provides, and it is thus made his duty to furnish the distiller with the necessary funds for the payment of this tax when demandable from the distiller. The holder of the certificate has *actual* knowledge of the quantity of spirits belonging to him in the distiller's hands, and the statute gives him *constructive* notice of the time when the tax is payable. Upon application to the distiller therefore at the proper time, he can learn the amount of the tax payable by him thereon—and upon his failure to remit to the distiller, the latter may enforce his lien, and it is no legal objection to the validity of the law that the enforcement of the lien may be attended with some delay and that the costs incurred must await the completion of this process. We are not informed how these warehouse certificates are framed, but the distiller may if he sees fit, have them so drawn as to impose upon the purchaser by express stipulation, the duty of paying to the distiller at stated periods such amount of money upon each barrel of spirits held by warehouse certificate, as may be deemed adequate to protect the distiller against this tax, and to provide for immediate sale in default of such payment; and it is no answer to this to say that the Government tax must also be paid before such sale can be made, since prompt sale will always ensure the immediate re-
62 imbursement of both taxes, and will avoid all cost of insurance and risk of leakage urged by the appellants as destructive of all value to the lien given.

Finally, in the case of Commonwealth *vs.* Gaines, 80th. Ky. 489, a statute in every respect similar to the act of 1892 has been declared constitutional and valid. In that case, one of the questions considered by the court was stated by it in these words. "Was the whiskey rightfully assessed to the appellees, who are the owners, on the ground alone that they were the possessors of it on January 10th. 1880?"; and in answering this question the court said: "The relative rights which may exist 'between the owner and possessor of the whiskey cannot affect the power of the State to authorize its assessment to either of them as the legislature may deem most prudent and apt to result in securing taxes from them. Indeed, convenience and necessity unite in support of the well established doctrine that the taxing power may impose taxes upon persons or property, and may adopt remedies for their collection which operate against the person of the owner, or the possessor, or the thing taxed or all of them combined. If this were not the case, non resident

owners, from the proximity of the States, and the commercial rights of all citizens in each, would escape taxation on their movable property produced by our own soil, while it receives the protection of our laws." It has been suggested by the appellants that this decision has no application in this case, because the constitution of Kentucky does not, as ours does, require that taxes be imposed upon the
63 owner of property and not specifically upon the property itself. But we have already said in the Monticello case, and have here repeated, that we hold this tax to be upon the owner of the spirits and not upon the spirits specifically, and the Kentucky case is directly in point—even if we disregard that part of the opinion, which sanctions the imposition of a tax upon either persons or property.

The demurrer to the ame-ded declaration, and the first, second, and third exceptions to the exclusion of evidence raise the question whether the appellants as the possessors or custodians of these spirits can be legally required to collect from the owners and pay to the proper officer, the tax due from the owners. The appellants' second, third and eighth prayers raise the same question at the close of the case, and it follows from what we have said that there was no error in overruling the demurrer, in excluding the testimony offered under the first, second and third exceptions to show that defendants were not the owners of the spirits, nor in the rejection of defendants' second, third and eighth prayers; and for the same reason there was no error in granting the plaintiff's first prayer which embraces all the facts necessary to a recovery, assuming the law upon which the claim is based to be a valid enactment.

This suit was instituted July 11th. 1901 by Alfred Fowble then treasurer and collector of Baltimore county, and the trial was had on February 5th. 1902. During the course of the trial the
64 plaintiff proved that the term of Fowble had then expired, and that Willie B. Cochran had succeeded him as treasurer and collector. Thereupon the court directed the declaration to be amended by striking out the name of Alfred Fowble as treasurer and collector, and inserting the name of Willie B. Cochran—to which direction the defendant objected, but the court overruled the objection, and the amendment was made; and this is the ground of the fourth exception.

Ordinarily an entirely new plaintiff cannot be made by amendment, but the local law of Baltimore county creating the office of treasurer and collector provides that "in all cases where a treasurer and collector has taken steps for the enforcement of the payment of said taxes either by notice, levy, advertisement, *or other proceedings* and his term of office shall expire before said proceedings are completed, the newly elected and qualified treasurer and collector is empowered and required to continue and complete said proceedings in the same manner as is now provided by law, and with all the power and authority had in law by the retired treasurer and collector during his term of office for that purpose." Under such a remedial statute every implication is to be made to accomplish its

purpose, but in view of the emphatic and comprehensive language used here there is no room for implication, the authority being express. There was no error then in this ruling, nor in the rejection of defendant's first prayer which denied the right to recover because Fowble's term had expired.

65 The plaintiff's second prayer, and the defendant's fourth and fifth prayers, present opposing theories as to the validity of the levy made for the year 1900, by reason of the failure of the State tax commissioner to send to the county commissioners his return of distilled spirits in defendant's warehouse, until Feb'y 28th, 1901.

Revenue statutes are to be construed liberally to carry out the purposes of their enactment. U. S. *vs.* Hodson, 10th. Wall. 395, and if we should hold this levy invalid for the reason assigned, we should by means of strict construction, permit the mere inadvertance of an independent department of government in making a return within due time, to paralyse the taxing power of the State, and we do not think this would be a proper construction under the circumstances of this case.

In Hopkins *vs.* Van Wyck, 80 Md. 15, where the Balt. City Code provided that the valuation of property as it stood on the assessor's books on the first Monday of March, should be the basis upon which taxes for the ensuing year should be levied, but certain property *property* of Mrs. Van Wyck was not placed on the books until May 12th, two days after levy for that year was made, and *in a suit like the present* by the collector to recover taxes upon this particular property, it was held that "it was never designed by this provision to exempt from taxation for a current year the individual who by adroitness *or otherwise*, succeeded in eluding the vigilance of

66 the assessors, or who by inadvertance was not rated with all his assessable property on the first Monday of March in that particular year." We can perceive no error in granting the plaintiff's second prayer, nor in rejecting the defendant's fourth and fifth prayers.

The evidence of John H. Carstairs, one of the defendants, is, that on June 14th, 1901, the tax bill here sued on, July 11th, 1901, was received by defendants, but that "they thought the matter was done with because the law in Baltimore had been declared unconstitutional." The receipt of this bill was notice to them of the assessment, and the act of 1898 ch. 275, gave a right of appeal therefrom. Had such appeal been taken, and had it resulted in declaring the assessment illegal, or erroneous, such judgment would have been pleadable in this suit and the facts set forth in defendant's 6th. prayer could not therefore be a bar to recovery. Fowble *vs.* Kemp, 92 Md. 360.

What we have said in reference to plaintiff's 2nd prayer, and to defendant's fourth and fifth prayers, is applicable to defendant's 7th prayer which was properly rejected.

Finding no error in any of the rulings, the judgment of the circuit court for Baltimore county will be affirmed.

Judgment affirmed with costs above and below.

Filed June 19th, 1902.

67 *Bond.*

Filed August 14th, 1902.

Know all men b- these presents, that we, Danial H. Carstairs, as principal, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Willie B. Cochran, treasurer and collector of Baltimore county, in the full and just sum of three thousand, five hundred dollars, to be paid to the said Willie B. Cochran, treasurer and collector of Baltimore county, for the payment of w-ich well and truly to be made, the said Danial H. Carstairs and the said Fidelity and Deposit Company of Maryland hereby bind themselves and each of them, and the heirs executors and administrators of the said Danial H. Carstairs, and the
68 successors of the said Fidelity and Deposit Company of Maryland, jointly and severally, firmly by these presents, seal- with the seal of the said Danial H. Carstairs, and the corporate seal of said body corporate, attested by its secretary and signed by its president, duly authorized, this thirteenth day of August, A. D. 1902.

Whereas the said Willie B. Cochran, treasurer and collector of Baltimore county, in the State of Maryland, recovered a judgment in the circuit court for Baltimore county for the sum of $1517.69 on the 10th day of February, A. D., 1902, against the above bounden Danial H. Carstairs and against John H. Carstairs as copartners trading as Carstairs Brothers, and the said defendants afterwards ap-ealed from the said judgment and the rulings of the said court to the court of appeals of Maryland, and the said court at its April term,
69 A. D., 1902, affirmed the rulings of the said circuit court and its judgments aforesaid, and the said Danial H. Carstairs and John H. Carstairs, the said defendants in said action have obtained a writ of error to the Supreme Court of the United States from the rulings of the said court of appeals and filed in the office of the clerk of said court a copy thereof to reverse the said judgment and rulings, and a citation directed to the said Willie B. Cochran, treasurer and collector as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date thereof.

Now, therefore, the condition of the above obligation is such that if the said Danial H. Carstairs and John H. Carstairs shall
70 prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obli-

gation shall be void, otherwise the same shall be and remain in full force and virtue.

DANIAL H. CARSTAIRS. [SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Per EDWIN WARFIELD, *President.*
THOMAS L. BERRY, *Ass't Secretary.*

[Seal Fidelity and Deposit Company of Maryland, Incorporated 1890.]

Sealed and delivered in the presence of
DANIAL V. LEE.

Approved
JAMES McSHERRY,
Chief Judge of the Court of Appeals of Maryland.

71 On the back thereof, is the following endorsements to wit: Danial H. Carstairs and John H. Carstairs, trading as Carstairs Brothers. *vs.* Willie B. Cochran, treasurer. etc. Supersedeas bond.—Mr. Clerk:—Please file. W. Cabell Bruce and D. K. Este Fisher attorneys for plaintiffs in error.

72 STATE OF MARYLAND, *sct:*

I Thomas Parran, clerk of the court of appeals of Maryland, at Annapolis, do hereby certify that the foregoing is a true transcript of the record and proceedings in the case of Carstairs Bros., *vs.* Willie B. Cochran, treasurer, and collector of Baltimore county, as the same remains on file in the clerk's office of the said court of appeals.

And do further certify that the said court of appeals of Maryland is the highest court of law and equity in said State, in which a decision can, be had in said case.

Seal Court of Appeals, Maryland.

In testimony whereof, I have hereunto set my hand as clerk, and affixed the seal of the said court of appeals, this twenty-fifth day of August A. D. 1902.

THOMAS PARRAN,
Clerk Court of Appeals of Maryland.

Endorsed on cover: File No. 18654. Maryland court of appeals. Term No. 122. Daniel H. Carstairs and John H. Carstairs, co-partners, trading as Carstairs Brothers, plaintiffs in error, *vs.* Willie B. Cochran, treasurer and collector of Baltimore county. Filed August 28, 1902.

FILE COPY.

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 122.

DANIEL H. CARSTAIRS ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIE B. COCHRAN, TREASURER AND COLLECTOR OF BALTIMORE COUNTY.

BRIEF FOR THE PLAINTIFFS IN ERROR.

W. CABELL BRUCE,
D. K. ESTE FISHER,
Attorneys for the Plaintiffs in Error.

(18,654.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 8665

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 122.

DANIEL H. CARSTAIRS AND JOHN H. CARSTAIRS, COPARTNERS TRADING AS CARSTAIRS BROTHERS, PLAINTIFFS IN ERROR,

vs.

WILLIE B. COCHRAN, TREASURER AND COLLECTOR OF BALTIMORE COUNTY, DEFENDANT IN ERROR.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is an action of assumpit begun in the circuit court for Baltimore county, a court of general jurisdiction in law and equity, by the treasurer and collector of Baltimore county, to recover taxes alleged to be due from the plaintiffs in error (who are distillers operating a distillery in said county), for the year 1900, under an act of the General Assembly of Maryland, chapter 704, passed in the year 1892.

The parts of this act material to the present controversy are as follows:

"SECTION 1. *Be it enacted by the General Assembly of* " *Maryland,* That there shall be levied and collected upon

"all distilled spirits in this State as personal property the "same rate of taxation which is imposed by the laws of the "State on other property for State and county purposes.

"SECTION 2. *And be it enacted*, That for the purpose of "such assessment and collection it shall be and is hereby "made the duty of each distiller, and of every owner or "proprietor of a bonded or other warehouse, in which dis- "tilled spirits are stored and of every person or corporation "having custody of such spirits, to make report to the State "tax commissioner on the first day of January in each and "every year of all the distilled spirits on hand at such date, "and the tax for the ensuing year from the said first of "January, shall be levied *and paid* on the amount of dis- "tilled spirits so on hand, as representing the taxable dis- "tilled spirits for such year, provided, however, that the "same distilled spirits shall not be taxed twice for the same "year.

"SECTION 3. *And be it enacted*, That the said tax commis- "sioner upon receiving said report shall fix the value of said "spirits for the purpose of taxation under this act, and "whenever the spirits are distilled by persons doing busi- "ness as a corporate body and having shares of capital "stock, the valuation by the tax commissioner shall be upon "the spirits, as personal property, without reference to its "capital stock which shall be treated as distinct from said "distilled spirits as reported and such valuation put upon "said stock as not to produce double taxation, and the said "tax commissioner shall without delay, transmit a copy of "said valuation by mail to the appeal tax court of Balti- "more city, and to the board of county commissioners in "the counties where distilleries are situate and all distilled "spirits upon the valuation and return so made, shall be "subject to municipal and county taxation as all other per- "sonal property located within the bounds of any county; "and the county commissioners of the counties where dis- "tilleries are situate, and the mayor and city council of "Baltimore are directed and required in making their an- "nual levies to impose upon the spirits so returned and "valued by the State tax commissioner the State taxes as "the same are prescribed by law.

"SECTION 4. *And be it enacted*, That it shall be the duty "of the distiller, owner or custodian, as hereinafter indi- "cated and described to make quarterly reports on the first

"days of January, April, July and October, in each year "between the first and fifth days of such months showing "all deliveries during the preceding current quarter, from "his custody or care, of any part of the distilled spirits so "reported; said delivery report to be made to the tax com- "missioner of this State, who shall without delay transmit "a copy of such report by mail to the appeal tax court of "Baltimore city and to the board of county commissioners "of those counties in which distilleries are situate; and said "distiller, owner or custodian shall also at the same time he "makes a delivery report to the tax commissioners make "said report in duplicate to the collector or other proper "officers designated by law to receive and collect taxes for "the county or city in which such distillery is situate, and "shall in each case along with said report to the collector, "make a remittance and payment of the tax upon such dis- "tilled spirits which shall be accounted for by said officer as "other State and county taxes are accounted for.

"SECTION 5. *And be it enacted*, That no distiller, owner, "or custodian of such distilled spirits shall permit the same "to go from his possession or control without the report and "payment of tax hereinbefore provided for, and any person "or persons or corporation violating the provisions of this "section shall be proceeded against by the proper officer "authorized to receive said taxes by distraint for the entire "amount of the taxes assessed for the current year, and "thereupon all such taxes shall become and be immediately "due and collectible by distraint, together with all costs at- "tending the proceedings and a further penalty of five "hundred dollars for each such violation.

"SECTION 8. *And be it enacted*, Any warehouseman, cus- "todian or agent, paying the tax on distilled spirits herein "provided for, shall have a lien upon the distilled spirits "covered by such tax."

This act having been held unconstitutional as to Baltimore city in the case of the Monticello Distilling Company *vs.* The Mayor and City Council of Baltimore, 90 Md., 416, because of its failure to provide for giving any notice of the assessment or an appeal, the General Assembly of 1900, by an act of that year, chapter 320, amended the third section

and added a section 12, but it is not material to the present controversy.

The plaintiffs in error, who were residents of the State of Pennsylvania, resisted the payment of the tax on the ground that the act required them to pay taxes on spirits *not belonging to them*, in their bonded warehouses, *and represented by negotiable warehouse certificates held by persons unknown to them.*

The docket entries and pleadings are shown on pages 8–12 of the transcript of record. As appears thereby, the plaintiffs in error demurred to the four counts of the declaration, and it was sustained as to the third and fourth and overruled as to the first and second counts. An amended declaration was filed and a demurrer to the third, fourth, and fifth counts of it was overruled, and pleas being filed to all counts and issues joined, the action was tried before a jury and a verdict found and judgment thereon entered for the defendant in error. The defendant in error having offered evidence tending to prove the facts of his case, and having closed (pp. 12–16), and the plaintiffs in error having proved their ownership of the distillery and the fact that they had made a return to the State tax commissioner of spirits on hand on January 1, 1900, their counsel then asked the witness (John H. Carstairs, one of the plaintiffs in error) the following question:

"Q. Did you own any of these spirits that were so returned?" and the defendant in error objected thereto and the court sustained the objection, which occasioned the first exception (p. 16).

The plaintiff in error then made the following offer:

"Mr. FISHER: If your honor pleases, to make our proposi-
"tion clear, I will submit the following offer:
"The defendants offer to prove by the witness, John H.
"Carstairs, and by Mr. Donaldson that the defendants on
"the first day of January, 1900, did not own any of the
"whiskey mentioned in the tax bill offered in evidence, and

"in the return made by the defendants to the State tax "commissioner in January, 1900, excepting 489 barrels, and "that the defendants have not owned any of said spirits since "that time excepting those 489 barrels, but that all of said "whiskey, excepting said 489 barrels, belonged to other "persons unknown to the defendants, who held negotiable "warehouse certificates therefor, evidencing their owner-"ship."

The refusal of the court to permit this evidence to be offered occasioned the second exception (p. 17).

The plaintiffs in error then proved that the spirits on hand on January 1, 1900, were in their different *bonded warehouses* (p. 17).

The next exception was the ruling of the court in refusing to permit the manager in charge of the distillery or bonded warehouses to describe the control the internal revenue officials of the United States had and exercised over the distillery and bonded warehouses (p. 17).

And the plaintiffs in error then proved that the return made by them to the State tax commissioner did not show whether the spirits mentioned therein were owned by them or by other persons (p. 17).

After some evidence offered in rebuttal by the defendant in error, which is not material, the evidence being all in, he offered two prayers, which were granted (p. 22).

The first prayer in substance instructed the jury that if the State tax commissioner reported to the county commissioners the number of barrels of whiskey and his valuation thereof, which were in the custody of the plaintiffs in error on January 1, 1900, and the county commissioners levied the taxes thereon for the year 1900, and that the plaintiffs in error did not pay them, the verdict should be for the amount of the taxes claimed.

The second prayer is substantially the same, except that it introduces some other facts not material to the present discussion.

The plaintiffs in error then offered eight prayers (pp. 22–42).

The second, third, fifth, and eighth prayers are the only ones which will be discussed.

The second prayer asserts that there is no evidence that the plaintiffs in error were on January 1, 1900, the owners of any of the whiskey mentioned in the tax bill, and that it would be contrary to the law of the land and a taking of the property without due process of law to require them to pay taxes on whiskey in their *bonded* warehouses belonging to other persons.

The third prayer asserts that there is no evidence that the State tax commissioner was authorized by law to value the spirits (whiskey), or that the county commissioners were authorized by law to levy the tax claimed—the meaning intended was that the tax law itself, being unconstitutional, conferred no authority on those officials.

The fifth prayer is substantially the same as the third, and was intended to convey the same meaning.

The eighth prayer is substantially the same as the preceding mentioned prayers.

The court rejected all the prayers of the plaintiffs in error, and its action on the prayers of both litigant parties occasioned the fifth bill of exceptions.

The judgment being against the plaintiffs in error, they appealed to the court of appeals of the State, being the highest appellate court, and the ruling of the circuit court having been by it affirmed (Opinion, pp. 25–34), the plaintiffs in error sued out the writ of error.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign as errors that the circuit court for Baltimore county and the court of appeals of Maryland, in affirming the rulings of the said circuit court, erred in their rulings and action in this:

1. In overruling the demurrer of the plaintiffs in error to the third, fourth, and fifth counts of the amended declaration (p. 11).

2. In refusing to permit the plaintiffs in error to ask the witness John H. Carstairs the following question:

"Q. Did you own any of the spirits that were so returned?" (p. 16).

3. In refusing to permit the plaintiffs in error to offer evidence of the facts stated in the following offer of evidence:

"The defendants offer to prove by the witness, John H. "Carstairs and Mr. Donaldson, that the defendants on the "first day of January, 1900, did not own any of the whiskey "mentioned in the tax bill offered in evidence, and in the "return made by the defendants to the State tax commis- "sioner in January 1900, excepting 489 barrels, and that the "defendants have not owned any of said spirits since that "time, excepting those 489 barrels, but that all of said "whiskey, excepting said 489 barrels, belonged to other per- "sons unknown to the defendants, who held negotiable ware- "house certificates therefor, evidencing their ownership" (p. 16).

4. In granting the following prayers at the request of the defendant in error:

PLAINTIFF'S FIRST PRAYER.

"If the jury find that the State tax commissioner on or "about the 28th day of February, 1901, made return to the "county commissioners of Baltimore county of the number "of barrels of spirits and the valuation set thereon by said "tax commissioner held by the defendants, or in their cus- "tody on the first day of January 1900, as appears by the "return offered in evidence and that the county commis- "sioners of Baltimore county in making their levy for State "and county taxes for the year 1900, included in their said "levy the sum of four thousand five hundred dollars for "taxes due by all the distilleries in Baltimore county, in- "cluding the taxes estimated to be due by the defendants "for that year; and if the jury shall find that defendants "have not paid the taxes on said spirits so returned by the "tax commissioners, or any part thereof, then the verdict of "the jury in this case should be for the amount of taxes "claimed by the plaintiff with interest thereon from June "14th, 1901.

"(Granted.)"

PLAINTIFF'S SECOND PRAYER.

"If the jury shall find that the defendants in the month "of January, 1900, made return to the State tax commis- "sioner, under the act of 1892, capter 704, of the amount of "spirits in their bonded warehouse on the first of January, "1900, and that the State tax commissioner valued said "spirits at eight dollars per barrel, and that on the 19th day "of April, 1900, the State tax commissioner wrote to the "county commissioners of Baltimore county, saying that he "would transmit the returns of spirits held in the ware- "houses in Baltimore county the following week, and that "the same was not sent until on or about 28th February, "1901, and if they further find that the county commis- "sioners in making their levy for State and county taxes for "the year 1900, made the same upon an estimate of the four "thousaud five hundred dollars due for spirits by the dis- "tilleries situated in Baltimore county, and included therein "the taxes estimated as proper to be levied for taxes due by "defendants for spirits for the year 1900, under the act of

"1892, chapter 704, aforesaid, and if they find that said de-
"fendant has not paid taxes on said spirits for the year
"1900, then the verdict in this case should be for the plain-
"tiff for the amount of the tax claimed with interest thereon
"from June 14th, 1901.
"(Granted.)"

5. In rejecting the following prayers offered by the plaintiffs in error:

DEFENDANTS' SECOND PRAYER.

"The court instructs the jury that there is no evidence in
"this case that the defendants were the owners on January
"1st, 1900, or subsequently thereto, of any of the whiskey
"mentioned in the tax bill and return of the tax commis-
"sioner offered in evidence, and that it would be contrary
"to the law of the land and a taking of property of the de-
"fendants without due process of law, to require them to
"pay taxes upon whiskey in the defendants' bonded ware-
"houses on January 1st, 1900, or thereafter belonging to
"persons other than the defendants, and their verdict must
"therefore be for defendants.
"(Refused.)"

DEFENDANTS' THIRD PRAYER.

"The court instructs the jury that there is no evidence in
"this case that the State tax commissioner was authorized
"by law to value the spirits mentioned in the evidence to
"the defendants, or that the county commissioners were au-
"thorized by law to levy the tax claimed by the plaintiff
"upon said spirits, and their verdict must therefore be for
"the defendants.
"(Refused.)"

DEFENDANTS' FIFTH PRAYER.

"The court instructs the jury that there is no evidence in
"this action that there was any lawful levy of the taxes
"claimed in this action upon the spirits mentioned in the
"evidence, and their verdict must be for the defendants.
"(Refused.)"

DEFENDANTS' EIGHTH PRAYER.

"The court instructs the jury that the plaintiff is not entitled to recover in this action because—

"1. There is no evidence that the defendants were on the first day of January, 1900, or thereafter, the owners of any of the spirits mentioned in the evidence.

"2. Because there is no evidence of any obligation on the defendants to pay the taxes claimed in this action.

"3. Because there is no evidence in this action that the State tax commissioner had lawful authority to value the spirits mentioned in the evidence to the defendants, or that the defendants were lawfully assessed therewith, and that the verdict of the jury must be for the defendants.

"(Refused.)"

6. In holding the act of 1892, chapter 704, a valid and constitutional enactment, and in holding valid and lawful the tax claimed by the defendant in error in this action upon spirits in the bonded warehouses of the plaintiffs in error, not belonging to them, but to other persons, unknown to the plaintiffs in error, and represented by negotiable warehouse certificates held by the owners of said spirits.

ARGUMENT.

The position of the plaintiffs in error is that the act of 1892, chapter 704, requires the distiller and the owner of a bonded or other warehouse to pay out of his own funds taxes due from owners of spirits stored therein who hold negotiable warehouse certificates therefor and are unknown to the distiller or warehousemen, and that such an act is repugnant to natural justice and to the first section of the fourteenth amendment to the Constitution of the United States. It requires one man to pay the debt of another.

I.

It is a principle of every system of law that every man shall be protected in the enjoyment of his property, and that it shall not be taken from him without just compensation. It finds expression in the earliest constitutions, and in Magna Charta the guarantee is that no freeman shall be disseized of his freehold but "by the judgment of his peers or by the law of the land."

10 Am. & Eng. Ency. of Law, 2d edit., 290.

And the law of the land must necessarily be consistent with the constitutional provisions or it cannot stand. If, therefore, any law is repugnant to the Constitution it cannot stand; it is no law at all. The "law of the land" means *constitutional* law. The Constitution of the United States guarantees that—

"No State shall *make or enforce* any law which shall abridge "the privileges or immunities of citizens of the United "States, nor shall any State deprive any person of life, liberty "or property without due process of law * * *"

Sec. 1, 14th amendment, Constitution U. S.

One of the privileges of every one, recognized in the fourteenth amendment, is the enjoyment of one's property with immunity from seizure under color of a law essentially repugnant to the Constitution, and nowhere is this more plainly stated than in the case of Thistle, &c., *vs.* Frostburg Coal Co., 10th Md., 144, in the following language:

"It is clearly not within the scope of the legislative power "to give to a law the effect of taking from one man his prop-"erty and giving it to another," &c.

The facts of that case bear no similarity to the present controversy; but that is immaterial. The principle is recognized that the property rights of individuals are inviolable. The

legislature has no more right to take one man's property and give it to the Government to pay taxes due upon the property of another, than it has to take it and give it to another person.

This court expressed the same idea in language more apposite to the facts of this case in case of Hartman *vs.* Greenhow, 102 U. S., 684, bottom, as follows:

"* * * Surely it is not necessary to argue that an "act which requires the holder of one contract to pay the "taxes levied upon another contract held by a stranger can-"not be sustained. Such an act is not a legitimate exercise "of the taxing power; it undertakes to impose upon one the "burden which should fall, if at all, upon another."

The reference to this case in the argument in the Court of Appeals was said by it to be entirely inappropriate, because it was said in the court's opinion that the facts of that case bore no similarity to this.

The facts were that a citizen of Richmond, Virginia, who held certain coupons originally attached to bonds of the State of Virginia issued under an act making the coupons receivable for taxes, tendered them to the city treasurer in payment of taxes due from him; but the treasurer refused to accept them without first applying them in payment of taxes due on the bonds themselves, which were held by some other person, and defended his position by relying upon an act of that State which expressly required that the taxes upon the bonds should be collected at the time of the payment of the interest thereon, and made it a high penal offense to receive coupons in payment of taxes without deducting from their face value the taxes due upon the bonds from which they were taken.

The main argument was that the act impaired the obligation of contract; but this court, in addition to holding the act unconstitutional because it impaired the obligation of the contract, also rested its argument against the validity of

the act upon the impossibility of any law being valid which required one man to pay the tax due from another, in the language we have quoted.

But whether the facts of that case are similar to the facts of this is not very material. The principle is maintained that one man's goods cannot be taken to pay another's taxes.

Another illustration of the application of the principle may be seen in the case of

Camp *vs.* Rogers, 44 Conn., 291.

A statute of Connecticut provided that—

"the driver of any vehicle meeting another on the public "highway, who shall neglect to turn to the right, and thereby "drive against the vehicle so met, and injure its owner or "any person in it, or the property of any person, shall pay "to the party injured, treble damages; and that the owner "of the *vehicle so driven* shall, if the driver be unable to do "so, pay such damages," etc.

It was contended in this case that the *owner* would be liable, even though he was not in the vehicle and had no control over the driver. At 296:

"Such a result is in itself so absurd as either to show that "the statute should not be so construed as to produce it, or "that, if this be a correct construction, it is so far void, either "as manifestly against natural justice or of violating that "article of the Constitution which forbids the taking away "of any man's property *without due process of law*. If such a "law so construed were to be held valid, then a law that "should by a merely arbitrary rule make one man liable "for the debts of another would be valid."

But it is useless to multiply examples to prove a principle so fundamental.

II.

That the act of 1892, chapter 704, violates the fundamental principle of the right of persons to be secure in the possession and enjoyment of their property, we submit there can be no doubt, if the act is to be considered as applicable to spirits belonging to others in bonded warehouses of the distiller. In the following cases the court took the contrary view :

Monticello Distilling Co. *vs.* Mayor & City Council of Balto., 90 Md., 416.

Kemp *vs.* Fowble, 92 Md., 8.

Carstairs *vs.* Cochran, 95 Md., 498, &c. (the last mentioned being the present case).

The court of appeals thought the act was lawful

A

because the act, though requiring the distiller or warehouseman to pay the taxes of other persons unknown to them, gives a lien upon the spirits for the payments so made.

It is quite obvious that the act did not contemplate that the distiller or warehouseman should pay the tax out of the funds of the owner of the spirits, for it provides that on paying them he shall have a lien (sec. 8).

Plainly he is to have a lien to secure him for money of his own so laid out, not money of the owner of the spirits.

The legislature knew very well that the distiller or warehouseman must necessarily, in order to perform the law, pay with his own money the taxes due from other persons.

A law of such a character would seem plainly to be a stretch of legislative power, even if an effective and complete lien were given for the money so paid, with machinery for its prompt enforcement. But where no mode for its en-

forcement is provided, as is the case here, the injustice of the law and its violation of fundamental rights are made conspicuous.

Without special provision for the enforcement of the lien, the distiller is left to the slow and expensive remedy of a suit in equity for its enforcement, if, indeed, it could be enforced at all. It is, indeed, a lean lien.

But when the provisions of the internal-revenue laws are borne in mind, the hardship and injustice of this law are still more conspicuous. They put an officer of the United States in charge of every bonded warehouse, and from the moment the spirits come into being they are in his custody, and are subject to the internal-revenue tax of $1.10 per gallon (R. S., sec. 3251*a*). He holds in his posession the key of the warehouse, and no one—not even the owner himself—can enter it except in the company of the officer in charge when admitted by his key.

R. S., secs. 3271–3272.

Spirits and whiskey, as a rule, are sold as soon as made, and pass into the bonded warehouse as the property of the purchasers. The title to them is represented by negotiable warehouse certificates, issued to the purchaser, which pass from hand to hand as freely as bank notes. Sold to a resident of Baltimore today, they may be the property of a resident of Illinois tomorrow, and after the delivery of the warehouse certificate, the distiller or warehouseman cannot know who is the owner of the spirits until the holder of the certificate presents it to withdraw the goods.

By act of Congress the owner may leave the spirits in the warehouse, internal revenue tax unpaid, for a period of eight years.

Under these circumstances, the situation of the distiller or warehouseman who obeys this law of 1902 is hard indeed. He cannot well enforce the lien the act purports to give him for two reasons:

FIRST. Because there is a certificate, the title paper of ownership of the spirits, in the hands of some one unknown, stating upon its face, over the signature of the warehouseman, that the spirits are in the warehouse, to be delivered to the bearer of it on presentation. The statutes of Maryland provide as follows:

"* * * All warehouse, elevator or storage receipts "whatsoever for goods, chattels or commodities of any kind "stored or deposited, or in said receipts stated or acknowl- "edged to be stored or deposited for any purpose in any ware- "house, elevator or other place of storage or deposit in this "State, shall be and they are hereby constituted and declared "to be negotiable instruments and securities, unless it be pro- "vided in express terms to the contrary on the face thereof, in "the same sense as bills of exchange and promissory notes, and "full and complete title to the property in said instruments "mentioned or described, and all rights and remedies inci- "dent to such title, or arising or derivable from the said in- "strument, shall enure to and be vested in each and every "*bona fide* holder thereof for value, altogether unaffected by "any rights or equities whatsoever, of or between the origi- "nal or any other prior holders of or parties to the same, of "which such *bona fide* holder for value shall not have had "actual notice at the time he became such."

Section 1, Art. 14, Code of Public General Laws of Maryland.

"* * * No person or corporation whatsoever, having "issued or having outstanding as aforesaid any such re- "ceipt, acceptance of order or other voucher aforesaid, and "no agent or officer of any such person or corporation shall "part with, deliver or remove, or permit to be delivered or "removed, the goods, chattels or commodities in such in- "strument named or described, or any part thereof, except "only to or by the holder of said instrument, or upon his "order, and upon the presentation of said instrument with "his endorsement in every case, or without canceling or "destroying said instrument in case of complete delivery or "removal or endorsing thereon the quantity and description "of the goods, chattels or commodities delivered or removed, "and the names of the persons to whom delivered, or by

"whom removed, in case such delivery or removal shall be "partial only; and any principal person or corporation or "agent or officer of any person or corporation wilfully vio- "lating this section or any of the provisions thereof, shall "be guilty of a misdemeanor, punishable by a fine of not "less than one thousand, nor more than five thousand dol- "lars in the case of a corporation, and in the case of an in- "dividual by a fine of not less than one hundred, nor more "than five thousand dollars, and imprisonment in the peni- "tentiary for a period of not less than one year, nor more "than three years, in the discretion of the court."

Sec. 6, Art. 14, Code of Public General Laws of Md.

The attempt to enforce the lien before the owner of the spirits produced the warehouse receipts would, therefore, necessitate a breach of faith and contract on the part of the warehouseman and subject him to a fine and imprisonment in the penitentiary, unless the act of 1892 could be considered as relieving the warehouseman from these penalties and authorizing him to ignore his warehouse receipts and to withdraw the spirits at any time to enforce the lien. But the act does not so provide. It could not authorize a breach of contract.

SECOND. Because no spirits are permitted by the United States to leave the warehouse until the Government tax of $1.10 per gallon has been paid. So that even if he had the warehouse certificate he would be obliged to pay an enormous tax to the Government in order to collect the smaller tax he pays the State and county or city. The hardship of the case can be illustrated by an example. Suppose 100 barrels of whiskey are assessed at $800, and the distiller pays the State and city tax—say 2 per cent., or $16. To reimburse himself he must pay the Government tax of $1.10 per gallon on all the spirits in one barrel, for example, amounting, at forty gallons to the barrel, to $44, before he can withdraw them from the warehouse, in order to begin the enforcement of the lien by the slow and expensive machin-

ery of equity. He must employ counsel to conduct the suit in equity and must pay all the costs and expenses incident to the proceeding and sale of the whiskey. But the act of assembly does not provide that he may reimburse himself for his expenses. Nor is this all. It has already been said that the owner is permitted by act of Congress to leave the spirits in the bonded warehouse, tax free, for eight years. Suppose whiskey made and sold on December 31, 1900, to a purchaser and placed in the warehouse the same day, this law requires the distiller to pay the taxes on it for the ensuing year. After he has done so he must wait until the year 1908 before he can collect the tax so paid; if the owner takes the benefit of the act of Congress and does not come for the whiskey until the expiration of the eight years. During all these eight years the distiller must insure the whiskey to protect his lien against destruction by fire, and must run all the risk of leakage and breakage and evaporation and the danger of loss from collapse of the warehouse, and he must lose the interest on the amount of tax paid. The act of assembly does not say that he may recover the insurance, nor the interest on the money paid out in the payment of the tax, *nor does it even provide that the owner shall be liable to him personally for the amount of the tax paid for his account.* In case of destruction or loss of the spirits by leakage or breakage—causes of loss against which the distiller can probably obtain no insurance—he has no remedy at all, for his lien is gone and the act gives him no claim against the owner personally.

B.

Again, it is said by the court that the act makes the distiller or warehouseman a *collector* of the tax for the State and city or county, which the legislature has the right to do, and that the act is similar in all respects to the provisions of the Code, which provide for the payment by corporations

of the taxes levied against their stockholders upon shares of stock held by them. It may be conceded that the act was probably modeled after the act taxing shares of stock of Maryland corporations, which provides that the corporation shall pay the tax upon the shares of stock and charge the same to the stockholder, and in the case of non-resident stockholders shall also have a lien upon their stocks.

Art. 81, secs. 138 and 141, Code of Public General Laws of Md.

But there is a great and fundamental difference between the relation of the corporation and its stockholders and the warehouseman and the owner of spirits deposited in his bonded warehouse subject to the Government tax of $1.10 per gallon.

The warehouseman has no funds of the owner of the spirits out of which he can pay the tax, but must pay it out of his own funds, *whereas the stockholder is the owner of an undivided interest in all the corporate property and assets.* When, therefore, the corporation pays the tax on the stock of the stockholder, *it pays it with his money.* It matters not that nothing is presently due to the stockholder. The payment is made with his capital. The corporation is, in such a case, in truth nothing but a collector in paying the tax; but the warehouseman, having no funds of the owner of the spirits in his possession, must necessarily pay with his own, and he is therefore not a collector, but is made liable for another's debt, and such was the intention of the act, as already shown, for it provides that he shall have a lien for the tax so paid.

And another distinction consists in the fact that the corporation is a creature of the State, which might well compel it to pay another's tax as a condition of its existence and exercise of powers which it can derive from the State alone.

These views fully distinguish from the one at bar the case of New Orleans *vs.* Houston, 119 U. S., 265, and the Mary-

land cases and others dealing with the validity of tax laws requiring the corporation to pay the taxes levied on the stock of the stockholders.

C.

Then, again, it is said that it is lawful to require the person in possession of tangible personal property, whether he be the owner or not, to pay the taxes thereon, and Cooley on Taxation is cited as an authority for the porposition, and it is said that numerous cases are cited by him in support of this proposition. None of them, however, are decisions of this court, and many of them do not touch upon this point at all. But it may well be conceded that as a general proposition the person in possession may be required to pay the tax, without impairing the argument against the act of 1892, for the case of the owner of a bonded distillery warehouse is far different from that of one in possession of tangible personal property; the latter, having the tangible property on which the tax is due actually in his possession, has the means of immediately providing the money to pay the tax by the sale or pledge of the chattel, or, in the instance of a tenant referred to in the opinion of the Court of Appeals in this case, he has the accruing rent in his own hands with which to pay, whereas, as has already been shown, the warehouseman not only has not the physical possession of the spirits, which, on the contrary, are in a bonded warehouse under the lock and key of a Government official and cannot be withdrawn without the payment of the Government tax; but if he had the possession he could not use the spirits to raise the money, for the reason that the certificate or warehouse receipt representing their ownership is outstanding, and their removal from the warehouse without its return and cancellation is prohibited by law and made a high penal offense.

The only apology or justification which can be made for a law requiring one having possession, without ownership, of

tangible property to pay the tax thereon is that he has the means of immediately providing himself, at the expense of the owner, with the funds necessary to pay the tax, and where the conditions created by law are such, as in the case of the distiller or warehouseman, that this cannot be done, the analogy fails.

D.

But further, the Court of Appeals says that the supreme court of Kentucky, in Commonwealth *vs.* Gaines, 80 Ky., 489, under a statute exactly similar to the act of 1892, held the tax constitutional.

It is submitted, however, that the constitutional question here presented was neither raised nor considered, so far as the report of the case shows, and that decision cannot be considered as bearing upon this present controversy. Moreover, the statute was not like the Maryland statute, though that may not be material (see p. 493).

In the subsequent case of *Commonwealth vs. Taylor*, 101 Ky., 327, the court did have before it a statute quite similar to the Maryland statute, but the constitutional questions presented in this present case were not raised or discussed, and the only constitutional questions referred to in the report were questions concerning the constitution of Kentucky. The case, however, contains a graphic account of the complete control and possession by the United States internal revenue officials of the bonded warehouse and its contents.

E.

Next it is said by the Court of Appeals that the distiller may, if he sees fit, so frame his certificates as to impose upon the purchaser the duty of supplying him with funds with which to pay the tax. But it is submitted that a tax statute which imposes upon a contracting party the necessity of

abandoning the usual mode of conducting business of the character in which he is engaged and burdening his contracts with such stipulations cannot be a reasonable and just exercise of legislative power, nor within the constitutional powers of the legislature. It is an unreasonable interference with the freedom of contract. It would destroy the ability to contract according to customary commercial practices, and any unusual stipulation in the certificates affecting their salability would be a most serious interference with the business of distillers and warehousemen.

It is not denied that the legislature, in the exercise of its power to make police regulations, may place *restrictions* upon the conduct of business, and regulate it for the general good, and fix rates when the business is of a *public* nature. Such provisions are negative or restrictive in their operation, and, as a general, if not universal, rule, valid legislative enactments affecting the freedom of contract will be found to be of this character.

But if this statute would force the distiller, in order to protect himself, to insert in the certificates stipulations that the holder should furnish him with funds to pay the tax, it is not restrictive or negative, but positive in its operation and imposes a new burden, and in that respect goes a step farther than the kind of legislation to which we have referred.

Many instances of valid legislation affecting freedom of contract are mentioned in the opinion of the supreme judicial court of Massachusetts rendered to the legislature of that State and printed in 163 Mass., 590, &c., but they are enactments operating negatively or restrictively.

The court of appeals of New York forcibly states the limits of legislative power to interfere with the freedom of contract in the following language:

"That no general power resides in the legislature to regu-
"late *private* business, prescribe the conditions under which
"it shall be conducted, fix the price of commodities or serv-
"ices, or interfere with the freedom of contract we cannot

"doubt. The merchant and manufacturer, the artisan and "laborer, under our system of government, are left to pur- "sue and provide for their own interests in their own way, "uutrammeled by burdensome and restrictive regulations, "which, however, common in rude and irregular times, are "inconsistent with constitutional liberty."

People *vs.* Budd, 117 N. Y., 15.

The same is admitted to be the law in Frisbie *vs.* U. S., 157 U, S., 165, &c.

The act of 1892, in forcing the distiller to load his warehouse certificates with stipulations that the holders shall furnish him with funds to pay their taxes, or pay the taxes with his own funds, transcends the limit. It is no apology for requiring one to pay the debt of another to say that he may protect himself by contract. Can the State excuse itself for requiring the taxes of one to be paid by another by saying that he may protect himself by contract?

Such stipulations would be ineffective, and the practical result would be that the distiller would have to provide his own funds to pay the tax; so that the suggestion of the Court of Appeals leads back to the inquiry already argued in this brief, whether the distiller can be forced by the legislature to use his own funds to pay the taxes of the unknown owners of spirits in his bonded warehouses, in consideration of a lien which he cannot enforce until the owner presents the certificate to take away the goods and submit to the deprivation of the use of his funds so laid out and all the attendant risks of loss.

It is not for us to suggest a law which would be constitutional. It is enough to show that the act of 1892, in the form in which it is drawn and is construed by the Court of Appeals, is unconstitutional.

If the views we have set forth are sound, it follows that the demurrer to the third, fourth, and fifth counts of the amended declaration ought to have been sustained; and as the case progressed, that the offers of evidence tendered by

the plaintiffs in error at the trial ought to have been accepted and the evidence admitted, and that the prayers of the defendant in error should have been refused and those of the plaintiffs in error granted, and that the trial court and the Court of Appeals in affirming its rulings committed the errors complained of and set forth in the assignments of error in the record and in this brief.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 122.

DANIEL H. CARSTAIRS ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIE B. COCHRAN, TREASURER, &c.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

W. CABELL BRUCE,
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(18,654.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 0031

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 122.

DANIEL H. CARSTAIRS ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIE B. COCHRAN, TREASURER, &c.

ANSWER TO THE BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR.

The defendant in error has raised in his brief a question concerning the jurisdiction of this court, alleging that the record does not disclose that a Federal question was involved in the trial in the State court and was decided adversely to the plaintiffs in error (p. 2); and in support of this position he asserts that the opinion of the court of appeals printed in the record does not contain a reference to any Federal question (p. 4).

Surely, when the State court of last resort has determined that a tax law is a valid enactment, and so decides adversely to the plaintiff in error, it cannot be successfully contended that because the State court saw fit in its opinion to ignore a distinct claim that the statute violated the Federal Constitution the writ of error must be dismissed. If

such a contention were sound, the Constitution of the United States would afford but feeble protection against legislation of the States in direct violation of its terms in many cases.

Chapman *vs.* Goodnow, 123 U. S., at p. 548.

That the point was distinctly made both in the trial court and in the court of appeals that the act under which this tax law was sought to be recovered is repugnant to the fourteenth amendment, and is not left to the slightest doubt.

It is distinctly asserted in the defendants' (plaintiffs' in error) second prayer (Record, p. 23), independent of any reference to the other prayers, that the attempt to make the defendants pay the taxes on spirits belonging to persons other than the defendants (plaintiffs in error) is

"contrary to the law of the land, and a *taking of property of* "*the defendants without due process of law,*"

using the very language of the fourteenth amendment.

And in the brief of the appellants (plaintiffs in error) filed in the court of appeals, printed in the report of this case in 95th Md., p. 491, Carstairs *vs.* Cochran, it is asserted that the act is—

"* * * Opposed to * * * the 14th amendment, "sec. 1, of the Constitution of the United States, which guar- "antees that 'no State shall make or enforce any law which "shall abridge the privileges and immunities of citizens of "the United States; nor shall any State deprive any person "of life, liberty or property without due process of law "* * *'"

See N. Y. C. & H. R. R. R. Co. *vs.* New York, 186 U. S., at p. 273 (as to effect of statement in brief).

After this reference to the record, can it be said of this case, in the language of this court quoted from 120 U. S., 103, on page 2 of the Brief of the Defendant in Error, that—

"Certainly it does not appear unmistakably that the "supreme court of the State either *knew or ought to have*

" *known* that the validity of the statute in question was chal-
" lenged on account of its repugnance to the Constitution or
" laws of the United States."

It is not necessary that the Constitution of the United States should be expressly *named* or referred to in the record.

It is sufficient if the record shows that a constitutional question was involved—that the plaintiff in error relied upon a right guaranteed by that instrument.

Wilson *vs.* The Blackbird, &c., 2 Peters, 250, &c.
Satterlee *vs.* Matthewson, 2 Peters, 409–'10.
Beer Co. *vs.* Massachusetts, 97 U. S., 29–30.
Furman *vs.* Nichol, 8 Wall., 56, 57, and 59, and averments of petition, p. 47, bottom.
Crowell *vs.* Randall, 10 Peters, 166 (top), 171 (bottom).
Tregea *vs.* Modesto, &c., 164 U. S., at p. 185.

In each of the cases in 97 U. S. and 8 Wall., *supra*, the allegation in the pleadings was that a State statute impaired a contract, but there was no mention of the Constitution of the United States or any section of it in the record. The subject was thoroughly examined in the case in 10 Peters, and this court there said, page 166, top:

"And here the doctrine of the court has been that it is not
" indispensable that it should appear on the record in *totidem*
" *verbis* or by direct and positive statement, that the question
" was made and the decision given by the court below on
" the very point; but that it is sufficient if it is clear from
" the facts stated, by just and necessary inference, that the
" question was made and that the court below must in order
" to have arrived at the judgment pronounced by it, have
" come to the very decision of that question as indispensable
" to that judgment."

And again, in the case in 8 Wall., *supra*, at page 56 (last half), this court again said :

"It is urged that the particular provision of the Constitu-
"tion which the plaintiffs in error say has been violated in
"its application to this case, should be contained in the
"pleadings; *but this is in no case necessary.*

"If the record shows either by express averment or by
"clear and necessary intendment, that the constitutional
"provision did arise and that the court below could not
"have reached the conclusion and judgment it did reach
"without applying it to the case in hand, then the jurisdic-
"tion of the court attaches."

And in Craig *vs.* State of Missouri, 4 Peters, 410, Chief Justice Marshall said on the same subject :

"* * * it is not necessary to state in terms in the
"record that the Constitution or a treaty or a law of the
"United States has been drawn in question, or the validity
"of a State law on the ground of its repugnance to the Con-
"stitution. It is sufficient if the record shows that the Con-
"stitution or a treaty or law of the United States might have
"been construed, or that the constitutionality of a State law
"must have been questioned, and the decision has been in
"favor of the party claiming under such law."

These citations and references to the record in this case conclusively show that a Federal question was involved, and the decisions of the trial court and the court of appeals upholding the validity of the act of 1892 taxing distilled spirits and entering and affirming the judgment necessarily overruled the objection of the plaintiffs in error that the application of the act to the facts of this case involved a taking of prope rty of the plaintiffs in error against the law of the land and without due process of law. The decisions of the two State courts were findings in favor of the right claimed by the State under the act of 1892, and of necessity against the immunity claimed by the plaintiffs in error.

Bells Gap Rd. Co. *vs.* Pennsylvania, 134 U. S., at p. 236.

It is true that in this case now before the court neither the pleadings nor prayers of the plaintiffs in error made a reference to the fourteenth amendment or any clause of it in *totidem verbis*. But the second prayer distinctly asserted that what the defendant in error was attempting to do was "*contrary to the law of the land and a taking of property of the defendants without due process of law.*"

This was the assertion of an immunity under the fourteenth amendment, and surely it could not be pretended that the learned courts which decided this case at *nisi prius* and on appeal did not know that by so asserting the plaintiffs in error threw themselves for protection upon the fourteenth amendment. The form of the assertion of the immunity as distinctly indicated under what instrument the plaintiffs in error claimed protection as if they had quoted in the prayer the particular clause of it relied upon.

A Federal question was raised when the proposition was asserted that the thing which the defendant in error was attempting to do under the act of 1892, namely, compel the plaintiffs in error to pay taxes on spirits belonging to other persons, was contrary to the law of the land, and without due process of law. Whether the compulsion of the plaintiffs in error, by means of the act of 1892, to make the payment, is due process of law or not, is another question. But if one man cannot be made to pay another's taxes, then a suit to collect the taxes, which is founded upon a statute requiring one person to pay another's taxes, is not due process of law. If the foundation upon which the right asserted by the defendant in error is based is unsound, then, necessarily, the proceedings by which that right is asserted must be unsound.

Missouri Pacific Rwy. Co. *vs.* Nebraska, 164 U. S. 417.

Lewis *vs.* Emigrant, &c., 1 Fed. Rep., 668.

For due process of law refers not merely to regularity of the procedure under a law, but to the law itself as well; no proceedings, however regular in form, under an unconstitutional law, could be regarded as due process of law. Regular proceedings, to constitute due process of law, must necessarily be proceedings founded upon a law which is valid, for an invalid law is no law at all, and proceedings based upon an invalid law would be proceedings without law and therefore without due process of law and contrary to the law of the land.

It is submitted, therefore, not only that the record shows a Federal question to have been involved, but also that it was presented at the proper time and in the proper way.

Respectfully submitted.

W. Cabell Bruce.

D. K. Este Fisher.

FILE COPY.

DEC

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

Office Supreme Court U. S.
FILED
DEC 4 1903
JAMES H. McKENNEY,
Clerk.

No. 122.

DANIEL H. CARSTAIRS AND JOHN H. CARSTAIRS,
Copartners, Trading as
CARSTAIRS BROTHERS,
Plaintiffs in Error,

vs.

WILLIE R. COCHRAN,
Treasurer and Collector of Baltimore County.

In Error to the Court of Appeals of the State of Maryland.

BRIEF OF DEFENDANT IN ERROR.

D. G. McINTOSH,
Attorney for Defendant-in-Error.

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BRIEF OF DEFENDANT IN ERROR.

The question sought to be raised under the writ of error in this case is the validity of an Act of the Legislature of Maryland regulating the collection of taxes on distilled spirits.

I. *As to Jurisdiction.*

The first question presented is, does the record disclose a case in which this Court can assume jurisdiction, or, in other words, does the record show that a federal question was involved at the trial in the State Court.

To sustain the writ the record must show that such question not only might have been, but actually was raised and decided adversely to the plaintiffs in error.

In Gray vs. Coan, 154 U. S. 589, the Chief Justice, on a motion to dismiss a writ of error to the Supreme Court of Iowa, said: "On looking into the record we find no question under the 25th section of the Judiciary Act made by the pleadings or passed upon by the Court; and we have often held that it must appear affirmatively from the record that such a question was made and passed upon before the Court can acquire jurisdiction to review the judgment of a State Court upon writ of error."

In the case of Kansas Endowment and Benevolent Association vs. Kansas, 120 U. S. 103, the Court used the following language: "Certainly it does not appear unmistakeably on the face of the record, that the Supreme Court of the State either knew or ought to have known that the validity of the statute in question was challenged on account of its repugnacy to the Constitution or Laws of the United States."

See also—Sayward vs. Denny, 158 U. S. 180.
Green Bay Canal Co. vs. Patten Paper Co., 172 U. S. 58.
Mallot vs. North Carolina, 181 U. S. 589.
England vs. Gebhardt, 112 U. S. 504.
Chapin vs. Fye, 179 U. S. 129.
Kipley vs. Illinois, 170 U. S. 182.
Miller vs. Cornwall, 168 U. S. 131.
Levy vs. San Francisco, &c., 167 U. S. 175.
Bolln vs. Nebraska, 176 U. S. 90.

It must also appear of record that the federal question was specially, or specifically set up, or claimed in the State Court, at the proper time and in the proer way.

Ex parte Spies, 123 U. S. 131.
French vs. Hopkins, 124 U. S. 524.
Chappel vs. Bradshaw, 128 U. S. 132.
Chicago & N. W. R. R. vs. Chicago, 164 U. S. 454.
Clark vs. McDade, 165 U. S. 168.
Erin R. Co. vs. Prudy, 185 U. S. 148.
N. Y. C. & H. R. R. Co. vs. New York, 186 U. S. 269.

A federal question can not be raised for the first time, after final decision in the State Court for the purpose of supporting a writ of error.

Scudder vs. Coler, 175 U. S. 32.

In California National Bank of San Francisco vs. Thomas, 171 U. S., 441, this Court speaking of the record said: "In all this record there was no federal right specially set up, or claimed by the plaintiff in error, until after the judgment in the Supreme Court, when a petition for the writ of error was filed by the California National Bank, a co-defendant with Thomas in the original action in which various allegations were made of a denial of federal rights."

In the case at bar neither the pleadings, nor the bills of exceptions containing the evidence and the instructions of the Court, disclose the presence of a federal question.

In the language of the Court, in Sayward vs. Denny, 158 U. S. 180, there is nothing in the record to indicate that the State Court was led to suppose that plaintiff in error claimed protection under the Constitution of the United States for the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument.

In Medbury vs. Ohio, 24 Howard, 413, and England vs. Gebhardt, 112 U. S. 504, it was held that the opinion of the Court was no part of the record. Later decisions of this Court seem to have departed from that rule. In the opinion of the Court of Appeals of Maryland, accompanying the record, the construction and validity of the Maryland Statute is discussed and passed upon, but not with any reference to the Constitution or laws of the United States. The decision of that Court covered two points: *First.* The law in question was upheld as not being in conflict with Article 15 of the Declaration of Rights in the Constitution of Maryland, in laying a tax upon property, in contradistinction to the owners of the property; and *second*, the construction given to the law was, that it did not compel one person to pay the debt of another.

As to the first point decided, this Court will not declare a State law void on account of its collision with a State Constitution or bill of rights (supposing such to be the case), it not being a case embraced in the Judiciary Act.

Medberry vs. Ohio, 24 Howard, 413.
Salamon vs. Graham, 15 Wallace, 208.

As to the other point; when the decree of a State Court turns upon its construction of a State statute, and not upon its constitutionality, this Court will not take jurisdiction on a writ of error under the 25th section of the Judiciary Act. It is the peculiar province and privilege of the State Court to construe its own statute.

Commercial Bank vs. Buckingham, 5 Howard, 317.
Adam vs. Preston, 22 Howard, 473.
Lent vs. Tilson, 140 U. S. 316.
Striker vs. Goodwin, 123 U. S. 527.
Morley vs. Lake Shore, etc., 146 U. S. 162.

A question of State law alone does not present a federal question so as to give this Court jurisdiction over a State judgment.

Hoyt vs. Thompson, 1st Black, 518.
Congdon vs. Goodman, 2 Black, 574.
Serial vs. Haskell, 14 Wallace, 12.

This Court has no power to review the decisions of State Courts upon questions of general law.

United States vs. Thompson, 93 U. S. 586.

Doubtless it will be claimed that under the authority of Bell's Gap R. R. Co. vs. Pennsylvania, 134 U. S., 232, a federal question was in the record, and whether adverted to or not was necessarily involved in the decision of the case. In disposing of the motion to dismiss in that case, this Court states that there was color for making the motion to dismiss, the Supreme Court of Pennsylvania in its opinion not seeming to have expressly passed upon the federal question, although it was clearly in the record.

The motion to dismiss the writ of error and affirm the judgment below is, therefore, respectfully submitted.

II. *As to the Merits.*

The writ of error in this case is prosecuted on the ground as asserted by the plaintiffs, that the Statute of Maryland, chapter 703 of the Acts of 1892, imposing a tax on distilled spirits, as amended by the Act of 1900, chapter 370, is repugnant to the Constitution of the United States.

The highest Court of the State has declared for the third time that the law itself did not infringe any constitutional right.

Monticello Co. vs. Baltimore City, 90 Md. 416.
Fowble vs. Kemp, 92 Md. 630.
Carstairs vs. Cochran, 95 Md. 488.

The persistent efforts to defeat this law show a determined purpose on the part of distillers of spirits to remove, if possible, from the reach of taxation a large mass of valuable property yielding large revenues to the State. Previous to the enactment of this law this species of property had escaped taxation in the State of Maryland, except possibly such small proportion as the distiller might voluntarily choose to return and pay on.

The regulations established by the United States Government for the collection of internal revenue on distilled spirits, and for the control and management of bonded warehouses in which the spirits are stored, place them beyond the reach of the ordinary methods used in the collection of taxes.

It is impossible for the State or municipal tax collector to levy or distrain on the spirits and thereby enforce collection of the taxes for the reason that the warehouses in which they are stored are under supervision and control of the United States Government.

A special system had to be devised which would insure the collection of the tax, while not interfering with governmental regulations.

The Act of 1892, Chapter 704, was the remedy resorted to by the State of Maryland. The main features of the law are not original with that statute. The State of Kentucky, probably the largest distiller of any State in the Union, had previously enacted laws containing substantially the same provisions for the assessment of spirits and the collection of taxes thereon.

Sections 4109 and 4111 of the Kentucky statutes, make the custodian of the spirits in bonded warehouses liable for State and municipal taxes, and require the proprietor of such warehouses to report and pay such tax. These provisions of the Kentucky statute have been before the Court of Appeals of that State a number of times. Their validity was directly assailed upon the ground that the

spirits could not be assessed to persons in possession who were not the owners. In the case of Commonwealth vs. Gains, 80 Kentucky, 489, the decision of the highest Court of that State sustained the law.

If the contention of the plaintiffs in error prevails and the Maryland Statute be declared unconstitutional, the effect will be to exempt from taxation a large amount of property which peculiarly invites and enjoys the protection of law. But protection implies taxation and the two are reciprocal.

The following propositions must be conceded in any discussion of the question:

First. That distilled spirits are goods and commodities and form a proper subject for taxation; and that a State has the power to tax all property having a situs within its territorial limits.

Pullman Palace Car Co. vs. Pa., 141 U. S. 18.
Fichlen vs. Shelby Co. Tax District, 145 U. S. 1.
P. & S. C. Co. vs. Bates, 156 U. S. 577.
Myers & Housman vs. Baltimore Co., 83 Md. 385.
Hopkins vs. Baker, 78 Md. 363.
Howell vs. State, 3 Gill, page 23.

In the case last cited the Court says: "The power of taxation extends to all the people of the government, and embraces everything which may be fairly considered as constituting a part of the mass of property within the State. This is a cardinal principle, on the preservation and application of which the existence of State government depends."

Referring to the phrase used in the 33d number of the Federalist, that the individual States would, under the proposed constitution, retain an independent and uncontrollable authority, to raise revenue to any extent of which they may stand in need, by "every kind of taxation," except duties on imports and exports. The Court adds:

"By every kind of taxation they mean the right to tax all persons and property within the jurisdiction of the State, and as such, subject to the taxing power, with the single exception of duties on imports and exports."

Second. Having the power, it becomes the duty of the State to impose taxes so that they bear equally upon all persons, and this can only be done by subjecting to taxation all property not legally exempt. Every properly devised revenue system must be framed along these lines. It is only necessary that the tax be laid for a public purpose, and bears equally upon those similarly situated.

This was the object aimed at in the 15th Article of the Declaration of Rights in the Constitution of Maryland; and such is the rule, approved alike by economists and jurists.

Adam Smith's Wealth of Nations, Bk. 5, ch. 2, pt. 2, page 651.
Vattel, Law of Nations, Bk. 1, ch. 20, sec. 240.
Cooley's Constitutional Limitations, 6th Ed., ch. 14, page 607.
People vs. N. Y. City and County, 76 N. Y. 64.

Third. It is for the law-making power to determine all questions of discretion or policy in ordering and apportioning taxes, and to make all necessary rules and regulations, and decide upon the mode by which the taxes shall be collected.

This Court has said, in Pullman's Palace Car Co. vs. Pa., *supra:* "For the purpose of taxation, as has been repeatedly affirmed by this Court, personal property may be separated from its owner and he may be taxed on its account, at the place where it is, although not the place of his own domicil and even if he is not a citizen or a resident of the State which imposed the tax."

Quoting Justice Story's Conflict of Laws, Section 550, the opinion adds: "Although movables are for many pur-

poses to be deemed to have no *situs* except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

In Jennings vs. Cold Ridge Iron Co., 147 U. S. 148, where the tax imposed by the State was deducted by the company from the interest on its mortgage bonds held by the plaintiff in error, which he declined to receive, the bonds being assessed at their face instead of their legal value, it was held, the provision in the 14th Amendment of the Constitution of the United States, that no State should deny to any person the equal protection of the law, does not prevent a State from adjusting its system of taxation in all proper and reasonable ways, not compelling States to adopt an iron rule of taxation.

In the case of Bell's Gap R. R. Co. vs. Pa., *supra*, on the strength of which the previous case was decided, and in which the tax was resisted on several grounds, and among others, on the ground that the corporation was taxed for property it did not own, the Court, speaking of the purpose and scope of the 14th Amendment and the general qualification necessary to be applied to it, quotes with approval the language of Justice Field in Barbier vs. Connolly, 113 U. S., 27: "The XIVth Amendment, in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their

happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and their property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the Amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, some times called the police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

Fourth. The construction given by the Maryland Court in 90 Md. 416, 92 Md. 630, and 95 Md. 488, to the Act of 1892, chapter 704, providing for the collection of taxes on distilled spirits, is in entire harmony with its previous rulings upon similar questions.

In U. S. Electric Power and Light Co. vs. State, reported in 79 Md. 63, where one of the questions was whether the company could be compelled to pay taxes on capital stock issued by it, the value of which was fixed by the State Tax Commissioner, the Court uses the following language:

"Upon the valuation thus ascertained the State tax is levied. But the tax is not a tax upon the stock or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the State for the collection of the State tax. It is not material what assets or other property make up the value of the shares. These shares are property, and under existing laws are taxable property. They belong to the

stockholders respectively and individually, and when, for the sake of convenience in collecting the tax thereon, the corporation pays the State tax upon these shares into the State treasury, it pays the tax not upon the company's own property, nor for the company, but upon the property of each stockholder and for each stockholder respectively, by whom the company is entitled to be reimbursed. Hence, when the owner of the shares is taxed on account of his ownership and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all."

See also—Casualty Insurance Co. Case, 82 Md. 564.
American Coal Co. vs. County Commissioners, 59 Md. 194.

In the last case the analogy between the principles announced by the State Court and those asserted by this Court in Kirtland vs. Hotchkiss, 100 U. S. 491, and Nevada Bank vs. Sedgwick, 104 U. S. 111, were pointed out and commented on.

The most recent decision in Maryland is the case of Corry vs. Baltimore City, 96 Md. 310, where the subject underwent an elaborate discussion at the hands of counsel and Court. The views expressed by the Court in that case were held to be in harmony with the following Federal decisions:

New Orleans vs. Stempel, 175 U. S. 309.
Savings and Loan Society vs. Multnomak County, 169 U. S. 421.
McCulloch vs. Maryland, 4 Wheaton, 316.
Coe vs. Errol, 116 U. S. 517.
Pullman Car Co. vs. Pa., 141 U. S. 111.
Kirtland vs. Hotchkiss, 141 U. S. 591.
Bristol vs. Washington Co., 177 U. S. 139.

In view of the long settled policy which is thus shown to have obtained in the State of Maryland, in the collection

of taxes, especially as determined in cases where the tax on corporate stock was required to be paid by officers of the company, and the recognition of the same principle by the Federal Courts, it is difficult to perceive how the contention of the plaintiffs in error can be sustained, when its certain effect would be to exempt from taxation this class of property.

The reasoning of the Maryland Court in the several cases referred to, where the validity of the law in question was assailed, has pointed out the fallacy upon which the plaintiffs' contention rests, and has shown that the cases relied on by them are not applicable to the present controversy. It would be worse than repetition to attempt again to cover this ground.

It may be said, of the plaintiffs' claim, that the distiller is taxed for property he does not own, as was said in Bell's Gapp R. R. Co. Case, *supra*: "This objection is not true in point of fact. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience and as a secure method of collecting the tax."

It may be said in conclusion, the distiller embarks in business with full knowledge of the law and all the surrounding conditions. The State has protected him as far as it could do so by giving him a lien on the spirits, for the amount of taxes paid by him. He has it in his power to provide any other safeguards which may be desired when he puts his goods on the market and offers them for sale. The goods are in his custody, and it is for him to impose conditions which will protect not only the State but himself.

The issuance of negotiable warehouse receipts representing title to the goods, is a mere custom, or incident in the course of trade. There is no reason why such receipts can not be drawn to protect the manufacturer or custodian of the spirts as well as the purchaser.

Knowledge of the law must be imputed to both.

The duty of paying the tax being cast by law on the custodian of the goods, it is competent for him to reimburse himself for the taxes paid before he parts with possession. The law imposes the tax, and the payment of it is a lien. The purchaser buys subject to that lien. It becomes simply a matter of commercial convenience, how that shall be adjusted between buyer and seller. It surely can not be seriously argued that the adoption of any custom which fails to take note of the law is such a circumstance as can have the effect of paralyzing the law and rendering the goods exempt from tax. The preservation of a wise system of equality and justice in enforcing its revenue law, is more important to the State than the upholding of a so-called custom which is alleged to be in the interest of trade convenience.

Respectfully submitted,

D. G. McINTOSH,
Attorney for Defendant-in-Error.

Supreme Court of the United States.

No. 122.—October Term, 1903.

Daniel H. Carstairs and John H. Carstairs, Copartners, trading as Carstairs Brothers, Plaintiffs in Error,
vs.
Willie B. Cochran, Treasurer and Collector of Baltimore County.

In error to the Court of Appeals of the State of Maryland.

[February 23, 1904.]

By chap. 704 of the Laws of Maryland, 1892, as amended by chap. 320, Laws 1900, the general assembly of that State provided for the assessment and collection of taxes on liquors in bonded warehouses within the State. The proprietors of such warehouses were required to pay the taxes and given a lien on the property therefor. This legislation was sustained by the Court of Appeals of the State, (95 Md. 488,) to review whose judgment this writ of error was sued out.

Mr. Justice Brewer delivered the opinion of the Court.

That the statutes in question do not conflict with the Constitution of Maryland is settled by the decision of its highest court. (*Merchants' Bank* v. *Pennsylvania*, 167, U. S. 461, and cases cited; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557–566; *Rasmussen* v. *Idaho*, 181 U. S. 198–200.)

A State has the undoubted power to tax private property having a situs within its territorial limits, and may require the party in possession of the property to pay the taxes thereon. "Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319. "Statutes sometimes provide that tangible personal property shall be assessed wherever in the State it may be, either to the owner himself or to the agent or other person having it in charge; and there is no doubt of the right to do this, whether the owner is resident in the State or not." 1 Cooley on Taxation, 3d ed., p. 653. See also *Coe* v. *Errol*, (116 U. S. 517;) *Marye* v. *Baltimore & Ohio Railroad*, (127 U. S. 117–123;) *Pullman Car Company* v. *Pennsylvania*, (141 U. S. 18;) *Ficklen* v. *Shelby County*, (145 U. S. 1, 22;) *Savings Society* v. *Multnomah County*, (169 U. S. 421–427;)

New Orleans v. *Stempel*, 175 U. S. 309;) *Board of Assessors* v. *Comptoir National*, (191 U. S. 388;) *National Bank* v. *Commonwealth*, (9 Wall. 353;) *Merchants' Bank* v. *Pennsylvania*, (167 U.S. 461.)

That under Federal legislation distilled spirits may be left in a warehouse for several years, that there is no specific provision in the statutes in question giving to the proprietor who pays the taxes a right to recover interest thereon, and that for spirits so in bond negotiable warehouse receipts have been issued, do not affect the question of the power of the State. The State is under no obligations to make its legislation conformable to the contracts which the proprietors of bonded warehouses may make with those who store spirits therein, but it is their business, if they wish further protection than the lien given by the statute, to make their contracts accordingly.

We see no error in the judgment of the Court of Appeals, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.